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Supreme Court, U.S.
FILED

No. 10-1012 01

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Supreme Court of the United States

MARICOPA COUNTY SHERIFF'S DEPARTMENT, *et al.*,
Petitioners,

v.

CHARLES EDWARD BYRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 31, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Federal courts have repeatedly held that under the Fourth Amendment, female detention officers may appropriately pat search male inmates over their clothing, even if it involves incidental contact to the genital area, and they may observe strip searches of completely naked male inmates. Here, Detention Officer cadet Kathleen O'Connell conducted what the jury found was a short, appropriate, penologically-justified pat search over Respondent Mr. Byrd's boxer shorts, but the Ninth Circuit, in a split en banc opinion, held that the cross-gender nature of this erroneously characterized "strip search" violated Mr. Byrd's Fourth Amendment rights as a matter of law. Does this ruling violate settled Fourth Amendment jurisprudence?

PARTIES TO THE PROCEEDING

Petitioners are the Maricopa County Sheriff's Department, Sheriff Joseph M. Arpaio, Captain Austin Peterson and Detention Officer Kathleen O'Connell.

Respondent is Charles Edward Byrd, who was a pretrial detainee being held in the Durango Jail, located in Maricopa County, Arizona, when the search at issue occurred.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, undersigned counsel reports that Petitioners are a public entity and individual public employees.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Maricopa County Sheriff's Department, Sheriff Joseph M. Arpaio, Austin Peterson, and Kathleen O'Connell respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' en banc opinion is reported at *Byrd v. Maricopa County*, 629 F.3d 1135 (9th Cir. 2011). (Pet. App. 1a-39a.) The court of appeals' panel opinion is reported at *Byrd v. Maricopa County*, 565 F.3d 1205 (9th Cir. 2009). (Pet. App. 40a-77a.) The district court's order ruling that the cross-gender nature of the search complied with the Fourth Amendment is not reported. (Pet. App. 78a-80a.)

STATEMENT OF JURISDICTION

The court of appeals' en banc opinion was filed on January 5, 2011. (Pet. App. 1a-39a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> Unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Plaintiff and 90 other inmates in his pod were pat searched over their boxer shorts by approximately 25 to 30 detention officer cadets. A third of the cadets were female. Plaintiff happened to be searched by a female, Defendant/Petitioner O'Connell. Mr. Byrd was a pretrial detainee being held in the Durango Jail at the time.

1. a. The Sheriff's policy on searches, Policy DH-3, defines a "frisk (body) search" as "carefully examining an inmate by inspecting his clothing, and feeling the contours of his clothed body." (Pet. App. 81a.) It defines a "strip search" as "a visual scan of the inmate's skin after all clothing has been removed." Policy DH-3(5)(A) states: "Male inmates may be frisk searched by either male or female officers. Female inmates will only be searched by female officers,

absent exigent circumstances." (Pet. App. 82a.) Officer O'Connell testified that she conducted a pat (frisk) search on Mr. Byrd because he had clothing on, and she did not view Mr. Byrd's skin after all clothing had been removed. Captain Peterson confirmed this.

b. Sheriff Arpaio testified that the purpose for the policy is security in the jail. The Sheriff's Department has 10,000 total inmates, only a few hundred of which are female. Contraband is a constant problem; thus searches are conducted every time inmates leave their cells, leave their housing unit, and go to or return from visitation, medical, court, activities, or other programs. Inmates are searched at least once daily, and more often several times daily. All of these searches are pat searches, except for those conducted after the inmate returns from a contact visit or from outside the facility, which are strip searches. In addition, pat searches of the inmates and searches of their cells occur any time the facility obtains information implicating the safety or security of the inmates and/or officers, such as reports of contraband, increased fighting, etc. Inmates are searched over their boxers "a couple of times a week."

c. Captain Peterson confirmed that there are simply not enough male officers at the facility to properly conduct all of these searches on the male inmates without the help of the female officers. (Pet. App. 85a-87a.) Especially when 90+ inmates are being moved out of a pod so that they and their cells can be searched, the facility needs a lot of manpower to conduct the search. For this reason the facility asks the cadet class to come over and assist in many cases. The record contains no evidence that the jail has

enough male officers to safely have only male officers conduct these pat searches of male inmates.

2. a. Officer O'Connell testified that on this day the cadets went to the jail to help with the searches due to multiple fights in the unit and a suspicion of contraband. Approximately 25 or 30 cadets, a third of them female, were there, along with ten or 15 officers, a third of them female. Anyone who is not a full-fledged officer must be accompanied in the jail by officers, for the cadets' protection. The officers also made sure the searches were within policy. All 90+ inmates in Mr. Byrd's pod were subject to the same search. While the cadets were pat searching the inmates, the SWAT team was searching the pods and the inmates' clothing.

b. The inmates were brought out of their pod in a line to the multipurpose room, in their boxers, four to six at a time. They walked in front of the cadets and turned so the cadets were behind them in rows. The cadets pat searched them, then the inmates went to the opposite end of the room and sat cross-legged facing the wall. The next line of inmates then came out. The inmates did not view the searches because they were told to look straight ahead and face the wall when their search was finished.

Mr. Byrd happened to be one of the inmates whom Officer O'Connell searched. Though she has searched several hundred male inmates, she has never had one complaint about her searches. Mr. Byrd testified that the search took approximately 60 seconds. Officer O'Connell testified that it took 10 to 20 seconds.

Officer O'Connell described how the pat search is conducted. She does not put her hands on any skin she can see. The officer searches from behind the

inmate. The boxers' waistband is pulled out a couple of inches and the waistband is felt to ensure that no contraband is taped to the inside. The hands do not touch the inmate's body. Officer O'Connell did not look inside Mr. Byrd's boxer shorts when she felt it for contraband. One hand is then placed at the lower back on the boxer shorts while the other hand, using slight pressure, pat searches the outer thigh from the bottom of the shorts up. Officer O'Connell testified that she has never accidentally touched an inmate's skin as she is searching over boxer shorts. Then she slides the same hand to the inner thigh over the shorts, searching up to where the groin and leg connect. Her hand is flat, with the thumb extended and her fingers straight out pressed together to prevent any sensation of groping or "fingers everywhere." The back of her flat hand moves the scrotum out of the way so that she can make sure there is nothing taped to or hidden in the groin, inner thigh, or perineum. Then she switches hands and completes the search on the other thigh in the same way. Next she takes her hand to the bottom of the buttocks cheeks where they start and runs the hand up through the crack to make sure nothing is taped, placed or hidden on the inside of the buttocks.[1] At no time did she touch an inmate's penis or lift an inmate's testicles. She stated, "I'm not cupping [the scrotum], I'm not grabbing it, and I'm not lifting it up to look underneath it." Officer O'Connell testified that she has never searched an inmate's penis, and she has never accidentally touched an inmate's penis.

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[1] The record lacks evidence that Officer O'Connell was searching for contraband "inside his anus," as the en banc majority stated. 629 F.3d at 1137, 1143 n.8.

Mr. Byrd was allowed to ask questions, but did not. Nor did he voice any objection to the search at the time it was occurring.

c. Mr. Byrd said he saw two people holding video cameras during the search, approximately 30 feet away. Officer O'Connell testified that one person had followed her academy class to videotape clips of their activities, and made a video yearbook for the cadets. He only took few-second clips of any activity. The jury was shown that part of the yearbook tape that included the search of Mr. Byrd's pod, but Mr. Byrd was not visible on the tape.

3. The district court directed a verdict for Defendants/Petitioners on Mr. Byrd's challenge to the cross-gender search, ruling as a matter of law that cross-gender searches of clothed inmates do not violate the Fourteenth Amendment (and perhaps the Fourth Amendment). (Pet. App. at 79a.)[2]

The claims that went to trial were whether Officer O'Connell violated (a) Mr. Byrd's Fourth Amendment or substantive due process rights by groping him; and (b) Mr. Byrd's Fourth Amendment rights by conducting a search without security reasons. The jury found for Officer O'Connell on all three claims, finding of necessity that she did not grope Plaintiff or improperly touch his anus during the search,[3] and

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[2] The court also granted judgment as a matter of law for Captain Peterson because he was neither the jail commander at the time of the search nor present when the search was conducted, and for Sheriff Arpaio in his individual capacity because he was not involved in the search.

[3] For this reason, the en banc majority was again incorrect in stating that Officer O'Connell "twice touched Byrd's penis and scrotum, and searched inside his anus." 629 F.3d at 1142, 1143,

that the search was conducted for legitimate security reasons. Plaintiff did not appeal any of these issues.

4. As is pertinent here, Mr. Byrd appealed the issue of whether the cross-gender pat search over his boxers violated the Fourth Amendment. The Ninth Circuit panel affirmed in a two-to-one decision. *Byrd v. Maricopa County Sheriff's Dep't*, 565 F.3d 1205, 1215, n.8 (9th Cir. 2009). (Pet. App. 40a-77a.)

a. Acknowledging the judicial deference to which prison officials are entitled when addressing issues of jail administration, *id.* at 1215-16, 1219, the panel found the search reasonably related to the jail's identified security need to eradicate contraband. *Turner v. Safley*, 482 U.S. 78 (1987). Then, considering the *Bell v. Wolfish*, 441 U.S. 520 (1979) factors, the panel found reasonable the search's scope, location, and manner (particularly the cross-gender aspect). 565 F.3d at 1221-24. The panel likened the search to the cross-gender searches the Ninth Circuit had previously upheld in *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985) (policy allowing females to conduct pat-down searches including groin area does not violate the Fourteenth Amendment), and *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) (Fourth Amendment allows female officers to monitor male prisoners during strip searches or in showers). Although the panel found the search invasive in that it involved contact with the genital region through boxer shorts, the manner of the search was not an exaggerated or excessive means to enforce security, considering the jury's findings and the "wide-ranging deference" the court owes to jail administration on

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n.8. (Pet. App. 17a.) Mr. Byrd himself confirmed there was no penetration into his rectum.

these operational issues. 565 F.3d at 1223-24. (Pet. App. 74a-75a.)

b. Judge Fernandez dissented – but not because he thought the majority mis-analyzed the law. Believing that "cross-gender strip searches are generally uncalled for and unreasonable," *id.* at 1225, he stated:

> When all is said and done, I would not think it was reasonable for males to strip search females in this kind of [non-emergency] situation, and I do not think it was reasonable to have females strip search males. If our law does approve of it, and the majority opinion cogently reasons that it does, I reluct; the law should change.

Id. at 1225-26. (Pet. App. 76a-77a.)

5. The Ninth Circuit granted rehearing en banc and reversed in a six-to-five decision. *Byrd v. Maricopa County*, 629 F.3d 1135 (9th Cir. 2011). (Pet. App. 1a-39a.)[4]

a. The majority repeatedly characterized this over-the-boxers pat search as a "strip search," and equated it with a "cross-gender strip and visual body cavity search," 629 F.3d at 1141-1143, concluding that the "cross-gender strip search of Byrd was unreasonable as a matter of law." *Id.* at 1142. It distinguished other over-clothing pat searches – which have been held constitutional – as follows:

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[4] Mr. Byrd did not seek rehearing en banc. After the mandate issued, the panel sua sponte entered an order directing the parties to file simultaneous briefs on whether the case should be reheard en banc. Petitioners filed their brief on time. Mr. Byrd did not, but after responding to an order to show cause, was given extra time to do so.

> Byrd was subjected to a search that involved twice moving his penis and scrotum aside and separating the cheeks of his buttocks to search inside his anus.[5] Neither was Byrd partially clothed, legally speaking. Rather, he was wearing only pink, nearly see-through underwear.[6]
>
> * * *
>
> If the search conducted were in fact a pat-down search of a partially clothed inmate, we would probably agree that the search was reasonable. However, because Byrd was subjected to a cross-gender strip search while nearly nude, we conclude that the search was patently unreasonable.

Id. at 1143, n.8. The majority cited five cases to support its decision, all of which involved cross-gender strip searches of completely naked inmates. 629 F.3d at 1144-47. (Pet. App. at 18a-23a.)[7]

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[5] These assertions were incorrect, as is noted above.

[6] The record describes the boxer material as "thin," whatever that term encompasses, but it lacks any evidence that it was "nearly see-through."

[7] *Moore v. Carwell*, 168 F.3d 234 (5th Cir. 1999); *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995); *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994); *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991); *Lee v. Downs*, 641 F.2d 1117 (4th Cir. 1981). The en banc majority was particularly impressed by *Lee v. Downs*' description of the state of the law in this area in 1981: "males subject to frisk searches by female guards during which the genitals are touched and felt through clothing are entitled to injunctive relief." 629 F.3d at 1145; Pet. App. 20a. But *Lee* improperly cited an Oregon court of appeals case for this proposition. 641 F.2d at 1120, *citing Sterling v. Cupp*, 44 Ore. App. 755, 607 P.2d 206, 208 (1980). That court of appeals case was modified by the Oregon Supreme Court the day before *Lee* was filed. The Supreme Court affirmed, but on state law grounds –

b. Five judges dissented. (Pet. App. 26a-39a.) They reasoned, ". . . (1) the deference we owe prison administrators, (2) the jury's undisputed factual findings, and (3) the relevant case law compel [the conclusion] that O'Connell's actions were reasonable under the Fourth Amendment." 629 F.3d at 1147. Finding the search to be a pat search and not a strip search, *id.* at 1152, the dissent could find "no meaningful difference between Byrd's search and what we have previously upheld." *Id.* at 1152. The dissent concluded that the majority's holding "illustrates the risks of not giving proper deference to prison officials":

> I question second-guessing prison administrators when such credible threats to officers' safety are present. Indeed, I would think such security concerns vindicate the Supreme Court's instruction to defer to prison administrators – an instruction that it seems the majority has too hastily disregarded.

Id. at 1154.

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's en banc decision conflicts with its own and other circuit courts' decisions holding that the Constitution allows appropriately-conducted cross-gender pat searches over clothing. Federal courts agree that the Constitution allows female officers to conduct searches like the one at bar – over-clothing pat searches of male inmates that

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Oregon Constitution article I, section 13. *Sterling v. Cupp*, 290 Ore. 611, 632, 625 P.2d 123, 136 (1981). Thus, the Oregon court of appeals' statement cited in *Lee* – which the en banc majority here found so compelling – was no longer good law.

are brief, professionally done, and penologically-justified.[8] [9] The Constitution even allows female officers

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[8] *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1995) ("routine pat down searches, which include the groin area, and which are otherwise justified by security needs, do not violate the fourteenth amendment because a correctional officer of the opposite gender conducts such a search"; search was brief, professional, and inmate was fully clothed); *Timm v. Gunter*, 917 F.2d 1093, 1101 (8th Cir. 1990) (upholding constitutionality of cross-gender pat-downs even if they include the groin area); *Madyun v. Franzen*, 704 F.2d 954, 960 (7th Cir. 1983) (upholding policy permitting females to pat search males even where there might be incidental contact with the genital area); *Smith v. Fairman*, 678 F.2d 52, 55 (7th Cir. 1982) (upholding a policy permitting female guards to pat search male inmates, excluding the genital area); *Bagley v. Watson*, 579 F. Supp. 1099, 1103 (D.Or. 1983) (upholding opposite-sex pat searches by female guards that includes a search of both the genital and buttock areas); *Martin v. Swift*, 781 F. Supp. 1250, 1253 (E.D. Mich. 1992) (there is "no question that [the pat-down search of a female arrestee by a male officer] would pass constitutional muster. To find otherwise would require every police car to carry two officers, one male and one female, so that misdemeanants would be searched by officers of the same sex."). *See also Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997) ("it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex."); *Martin v. Sullivan*, 2011 U.S. Dist. LEXIS 18164, *9 (E.D. Cal. 2011) (noting the *Byrd* en banc decision "contrasts with the conclusions" reached in *Grummett* and *Michenfelder*).

[9] In the one case that struck down a cross-gender over-clothing pat search policy, male officers were required to conduct routine, suspicionless searches of female inmates by "rubbing, squeezing, and kneading" their breasts, buttocks, inner thighs and crotches, and by pushing upward and inward into their crotches with no security reason – despite the fact that jail security was not dependent on the searches, and despite psychologists' warnings that this caused some inmates severe

to occasionally and incidentally, or from a distance, view completely naked male inmates.[10] But generally (absent an emergency) it would not be constitutionally appropriate for a female officer to strip search a male inmate – i.e., to purposefully inspect the cavities and/or outside of a male's completely naked body for contraband, including having the male lift his genitals and spread his buttocks for inspection.[11] The en banc majority attempted to

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emotional distress. *Jordan v. Gardner*, 986 F.2d 1521, 1530-31 (9th Cir. 1993) (finding Eighth Amendment violation).

[10] *Oliver v. Scott*, 276 F.3d 736, 743, 746 (5th Cir. 2002) (upholding under *Turner v. Safley* policy allowing females to observe male inmates in showers, but not allowing males to observe female inmates); *Johnson v. Phelan*, 69 F.3d 144, 149 (7th Cir. 1995) (cross-sex monitoring satisfies the *Turner* standard); *Michenfelder v. Sumner*, 860 F.2d 328, 334 (9th Cir. 1988) (Fourth Amendment allows female officers to monitor male prisoners during strip searches or in showers; observation was either infrequent and casual or at a distance); *Whittington v. Calif. Dep't of Corrections & Rehab.*, 2010 U.S. Dist. LEXIS 24776, *4-7 (N.D. Cal. 2010) (casual and occasional viewing of male's genitals by female correctional officers does not violate constitution).

[11] *Moore v. Carwell*, 168 F.3d 234, 235 (5th Cir. 1999) (claim that female officer conducted multiple strip and body cavity searches of male inmate should not have been dismissed as frivolous); *Somers v. Thurman*, 109 F.3d 614 (9th Cir. 1997) (female guards conducting visual body cavity searches of male inmates and watching them shower violates Fourth and Eighth Amendments, but right not clearly established); *Hayes v. Marriott*, 70 F.3d 1144, 1147-48 (10th Cir. 1995) (given limited information in record, defendants not entitled to summary judgment on Fourth Amendment claim arising from strip search of male inmate in view of "over 100 people, including female secretaries and case managers from other buildings"); *Canedy v. Boardman*, 16 F.3d 183, 187-88 (7th Cir. 1994) (complaint alleging female guards strip searched male inmate with no effort to balance his privacy interests with the prison's legitimate interests in secu-

bring the case at bar within this last group of cases by calling this a "strip search," even though Mr. Byrd was not naked, and even though Officer O'Connell did not conduct "a visual scan of the inmate's skin after all clothing has been removed" (as the policy defines a strip search), but rather "carefully examin[ed] an inmate by inspecting his clothing, and feeling the contours of his clothed body" – the definition of a frisk (body) search. Simply calling the search a "strip search" does not change the undisputed evidence below to the contrary, and it does not take the case out of the analytical realm of those searches long deemed constitutionally appropriate.

2. The Ninth Circuit's opinion improperly conditions the constitutionality of this cross-gender search, which the jury found was professionally conducted and penologically justified, on the assumed "thickness" or "thinness" of the clothing the searched person was wearing:

> If the search conducted were in fact a pat-down search of a partially clothed inmate, we would probably agree that the search was reasonable. However, because Byrd was subjected to a cross-gender strip search while nearly nude, we conclude that the search was patently unreasonable.

Byrd, 629 F.3d at 1143, n.8. The majority's "nearly nude" comment did not refer to the fact that Mr. Byrd was wearing boxer shorts, but to the supposition that the boxers' material was "nearly see-through," *id.* – a supposition unsupported in the record. While Officer O'Connell did describe the material as "thin," it might just have easily been described as "normal," or

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rity and equal employment opportunity, states a claim and should not have been dismissed).

"cotton." It certainly was not described as "threadbare" or "nearly see-through."

In a very real sense, the thickness of the clothing should not matter. As the dissent noted, no matter how thick the suspect's or inmate's clothing, "One has to apply enough pressure to contact the areas being searched, and to 'be able to feel something that's on the [area searched].'"

> In order to be effective, the searcher must be able to feel the inside thigh and perineum. On an inmate in street clothes, this may require more pressure, but results in the same contact in the same area.

Byrd, 629 F.3d at 1153. As long as the pat search is done over clothing, professionally, appropriately, and for a legitimate reason, it should survive Fourth Amendment scrutiny.

3. The court of appeals' ruling threatens significant adverse consequences throughout the Ninth Circuit and elsewhere. It wreaks havoc on the ability of female law enforcement officers to do their jobs, especially in warm climates like those in parts of the Ninth Circuit. In these jurisdictions, officers could often be called upon to pat search male suspects who are wearing only shorts, swim trunks, or other light clothing. If the Ninth Circuit's decision is not overturned, these officers are left to wonder in any circumstance, "How thin is 'too thin' under the Constitution?" Officers should not be hamstrung in their jobs worrying about whether the material of a

suspect's clothing is thick enough to allow them to conduct the search under the Fourth Amendment.[12]

In the jail setting as well, institutional security is of paramount importance. As Captain Peterson testified, and as other jail commanders in Arizona avowed, Arizona's jails simply do not have the luxury of having male inmates – who greatly outnumber female inmates – pat searched by only male officers. And jail officials need to be "accorded wide-ranging deference" in deciding what policies are needed to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Furthermore, to prohibit female officers – who comprise a full third of the detention officers in Maricopa County – from conducting the full range of their duties would relegate them to back-office administrative tasks and reduce the security of the jail. Allowing brief, appropriate, professionally-conducted, and penologically-justified cross-gender pat searches of male inmates thus serves – and is necessary to achieve – the important government objectives of enhancing security in the jail and ensuring equal employment for female officers.

4. Finally, the Ninth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court. This Court has not yet addressed whether an otherwise constitutional, professionally-conducted, penologically-justified over-clothing pat search becomes unconstitutional as a matter of law simply because of its cross-gender aspect and the type of material the searched person is wearing. This is an extremely important issue to

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[12] The opinion also could affect the admissibility of the fruits of such a search in a criminal case.

law enforcement and corrections officials – as is evidenced by the Maricopa County jails, where female officers comprise a third of the jail staff and their assistance in these pat searches is critical for maintaining jail safety and security. Female officers on the street also need to know whether they are able to pat search males over clothing that could be described as "thin." Before this case, such searches were constitutionally appropriate. Now, it is unclear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 31, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16640

CHARLES EDWARD BYRD,
Plaintiff-Appellant,

v.

MARICOPA COUNTY SHERIFF'S DEPARTMENT; JOSEPH M. ARPAIO; KATHLEEN O'CONNELL; AUSTIN PETERSON; DURANGO JAIL,
Defendants-Appellees.

December 15, 2009, Argued and Submitted,
San Francisco, California
January 5, 2011, Filed

JUDGES: Before: Alex Kozinski, *Chief Judge*, Mary M. Schroeder, Sidney R. Thomas, Susan P. Graber, Raymond C. Fisher, Ronald M. Gould, Richard A. Paez, Richard C. Tallman, Johnnie B. Rawlinson, Carlos T. Bea and N. Randy Smith, *Circuit Judges*. Opinion by Judge Rawlinson; Partial Concurrence and Partial Dissent by Judge N. R. Smith.

OPINION BY: Johnnie B. Rawlinson

OPINION

RAWLINSON, *Circuit Judge*:

Charles E. Byrd (Byrd), a pretrial detainee at the time, was subjected to a cross-gender strip search

of his genital area. Because the strip search was unreasonable under the facts of this case, we reverse the district court's entry of judgment in favor of Defendants-Appellees Maricopa County Sheriff's Department and then-cadet Kathleen O'Connell (O'Connell).

I. BACKGROUND

While Byrd was a pretrial detainee in a minimum-security facility, Maricopa County jail officials ordered a search of Byrd's entire housing unit (approximately ninety inmates). It is undisputed that no emergency existed. Rather, the search was precipitated by the occurrence of several fights and a suspicion of contraband in the jail.

Maricopa County Special Response Team officers carrying pepper ball guns and tasers entered the facility. They ordered Byrd to remove all clothing except his boxer shorts, which were pink and made of a very thin material. Once the inmates in the housing unit formed a line, jail officials ordered four to six inmates at a time into the "day room," a common area, to be searched. Cadets from the detention officer training academy searched the inmates with training supervisors present. The cadets wore jeans and white t-shirts with their last names printed on the back. They were not otherwise identified.[1]

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[1] This fact is important because of our undisputed recognition of the "feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers . . ." *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006), *quoting Thompson v. City of Los Angeles*, 885 F.2d 1439, 1446 (9th Cir. 1989); *see also Hayes v. Marriott*, 70 F.3d 1144, 1147 (10th Cir. 1995). After years of litigation, the dissent in hindsight declares that "it was surely apparent that the cadets were present in an

Approximately twenty-five to thirty cadets and ten to fifteen uniformed detention officers were present in the day room. However, none of the detention officers participated in the searches. At least one person videotaped the cadets' search of the inmates.

Byrd was searched by a female cadet. He testified that, during the searches, male detention officers stood by watching. The record clearly reflects that only four inmates were searched at a time, by no means an overwhelming number.[2] Although no factual finding was made on this point by either the judge or the jury, contrary to the dissent, it was by no means "undisputed . . . that the County did not have sufficient numbers of male detention officers to conduct searches of male inmates without the assistance of female officers." Dissenting Opinion, pp. 397-98.

When Byrd entered the day room, the cadets were lined up and waiting. O'Connell ordered him to turn away from her, spread his feet and raise his arms above his head. Wearing latex rubber gloves, she pulled out Byrd's waistband a few inches and felt the waistband to make sure nothing was hidden in it. O'Connell did not look inside Byrd's boxer shorts.

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official capacity." Dissenting Opinion, p. 401. n.5. However, that apparentness is not reflected in the record.

[2] The dissent takes issue with Byrd's testimony that male officers were standing idly by. *See* Dissenting Opinion, p. 397 n.4. However, this is precisely the type of evidence considered by the Fifth Circuit in *Moore v. Carwell*, 168 F.3d 234, 237 (5th Cir. 1999) (giving credence to Plaintiff's contention that male officers were present during the search, thereby suggesting that male officers were available to conduct the searches). Indeed, the referenced testimony of Officer Peterson does not specifically address the availability of the male officers to conduct the searches in question. *See id.*

Next, O'Connell placed one hand on Byrd's lower back holding the back part of the boxer shorts and, with her other hand, searched over his boxer shorts, his outer thigh from his hip to the bottom of the shorts. She then moved her hand from his outer thigh to the bottom of the shorts on his inner thigh and applied slight pressure to feel his inner thigh for contraband. Using the back of her hand, O'Connell moved Byrd's penis and scrotum out of the way applying slight pressure to search the area. O'Connell then searched the other side using the same technique.

Finally, O'Connell placed her hand at the bottom of Byrd's buttocks and ran her hand up to separate the cheeks while applying slight pressure, to search for contraband inside his anus. O'Connell estimated that the search lasted ten to twenty seconds, and Byrd estimated that the search took sixty seconds. After the search was completed, Byrd was directed to go to the opposite end of the day room, and sit facing the wall.

On the day of the search, Byrd filed an inmate grievance complaining that O'Connell "grab[bed] [his] balls and [his] scrotum." Byrd filed three additional inmate grievances to no avail. Byrd subsequently filed a *pro se* complaint naming Maricopa County Sheriff Joseph Arpaio (Arpaio), O'Connell, and Captain Austin Peterson (Peterson) as defendants. The complaint alleged that the search violated Byrd's right under the *Fourth Amendment* to be free from unreasonable searches, and Byrd's rights under the *Fourteenth Amendment* to equal protection of the laws and substantive due process protection to be free from punishment. [3]

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[3] Byrd's complaint actually referenced his *Eighth Amendment* right to be free from cruel and unusual punishment. The district

The district court dismissed Byrd's equal protection claim but denied Maricopa County's motion for summary judgment on Byrd's *Fourth Amendment* unreasonable search claim and his *Fourteenth Amendment* substantive due process claims. The court also appointed counsel to represent Byrd at trial.

Following the presentation of evidence, the district court granted judgment as a matter of law in favor of Peterson, O'Connell's supervisor, on the premise that Peterson was not connected to the search. Byrd does not challenge this ruling on appeal.

Additionally, the district court granted judgment as a matter of law in favor of Arpaio, finding that Byrd presented no evidence that Arpaio had instituted an unconstitutional policy or had personally participated in the search. The court also ruled as a matter of law that the search was constitutionally valid. Thus, with O'Connell as the only defendant, the district court narrowed the issues to be presented to the jury to these three:[4] (1) whether "O'Connell deprived [Byrd] of his right against unreasonable search by intentionally squeezing or kneading his

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court properly recharacterized this claim as a substantive due process claim under the *Fourteenth Amendment*. *See Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 & n.16 (1979) (explaining that the Due Process Clause applies when "considering the claims of pretrial detainees").

[4] Because O'Connell was acting in her capacity as a cadet with the Maricopa County Sheriff's Office, Maricopa County remained a putative defendant. *See Palomar Pomerado Health Sys. v. Belshe*, 180 F.3d 1104, 1108 (9th Cir. 1999) "The general rule is that relief sought nominally against a state officer is in fact against the sovereign if the decree would operate against the latter.") (citations, alterations, and internal quotation marks omitted).

penis or scrotum or improperly touching his anus through his underwear;" (2) whether "O'Connell deprived [Byrd] of due process of law" by "intentionally squeez[ing] or knead[ing] [Byrd's] penis or scrotum or improperly touch[ing] his anus through his underwear," with "[O'Connell's] actions inflict[ing] [wanton] pain on [Byrd];" and (3) whether "O'Connell deprived [Byrd] of his right against unreasonable search by conducting a search not done for [an] identified security need."[5]

The district court's formulation of these three issues for the jury's consideration completely eliminated the jury's contemplation of whether the cross-gender strip search violated Byrd's right under the *Fourth Amendment* to be free from unreasonable search. Instead, the district court's formulation of the factual issues presented to the jury limited the determination of reasonableness under the *Fourth Amendment* to whether O'Connell "intentionally squeezed or kneaded [Byrd's] penis or scrotum or improperly touched his anus through his underwear." The jury found in favor of O'Connell on all counts.

In *Byrd v. Maricopa County Sheriff's Dep't*, 565 F.3d 1205 (9th Cir. 2009), a divided panel of this court affirmed the district court's judgment. We subsequently granted rehearing en banc, 583 F.3d 673 (9th Cir. 2009).

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[5] Because this description is virtually identical to that articulated by our colleagues in dissent, *see* Dissenting Opinion, p. 393, we are puzzled by the accusation that we "paint[ed] the facts differently on appeal." *Id.*

II. STANDARD OF REVIEW

We review an order granting or denying judgment as a matter of law de novo. *See Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 938 (9th Cir. 2009). "Judgment as a matter of law is appropriate when the evidence presented at trial permits only one reasonable conclusion. That is, a motion for judgment as a matter of law is properly granted only if no reasonable juror could find in the non-moving party's favor." *Id.* at 938-39 (citations, alteration, and internal quotation marks omitted).

III. DISCUSSION

A. Substantive Due Process and Equal Protection Claims

Byrd did not strenuously press his substantive due process and equal protection claims during the *en banc* argument. In fact, Byrd's counsel candidly acknowledged that there was "a basis" for the panel's affirmance of the district court's decision to dismiss Byrd's equal protection claim for failure to state a claim. We review this basis for dismissal *de novo*, and may affirm the dismissal for any reason supported by the record. *See Thompson v. Paul*, 547 F.3d 1055, 1058-59 (9th Cir. 2008).

A peripheral equal protection issue was in the air because of the text of Maricopa County's Contraband Control Policy (Contraband Policy) distinguishing between male and female inmates when a frisk search is involved. According to the Contraband Policy, "[m]ale inmates may be frisk searched by either male or female officers[,]" but "[f]emale inmates will only be searched by female officers, absent exigent circumstances." However, there are two considerations that counsel against delving too deeply into the equal

protection issue. The first is Byrd's concession of "a basis" for the ultimate dismissal of his equal protection claim. The second is the lack of a factual record to properly analyze the equal protection claim.

It is important to note that Byrd did not challenge the Contraband Policy on which Maricopa County relied in its opposition to Byrd's claims. Rather, Byrd's equal protection claim was couched generally in terms of the treatment of male inmates, without reference to the policy. In any event, the Contraband Policy does not establish the reasonableness of the search. The Contraband Policy expressly provides that "[s]trip searches will be conducted by an officer of the same sex as the inmate . . . ." Under the Contraband Policy a strip search is defined as a "visual scan of the inmate's skin after all clothing has been removed." Maricopa County seizes on this definition to argue that the search performed on Byrd was not a strip search because Byrd was wearing very thin boxer shorts. Rather, Maricopa County maintains that Byrd was subjected to a frisk search.

The Contraband Policy defines a frisk search as "[c]arefully examining an inmate by inspecting his clothing, and feeling the contours of his *clothed body* . . ." (emphasis added). The Contraband Policy provides that "[t]he inmate's shoes and socks may be removed . . ." However, no mention is made of the removal of other clothing as part of a frisk search. In sum, the search was not properly conducted as a strip search under the Contraband Policy because it was not conducted by staff of the same gender, and it was not limited to a visual inspection of Byrd's body. The search was not properly conducted as a frisk search under the Contraband Policy because Byrd was not clothed as contemplated in the policy. The particular

search conducted in this case simply does not fall within the contours of the Contraband Policy. Therefore, no basis exists for concluding that the provisions of the Contraband Policy defeat Byrd's equal protection claim.

The district court dismissed Byrd's equal protection claim as one premised on the disparate treatment of prisoners and found, without acknowledging the gender element, that prisoners are not a suspect class. However, given the existence of a facially discriminatory contraband policy, an equal protection claim based on the disparate treatment of male and female prisoners was viable. *See Wyatt v. Terhune*, 315 F.3d 1108, 1111-12 (9th Cir. 2003) (acknowledging a male inmate's equal protection claim based on prison grooming regulations that did not apply to female inmates); *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994) (recognizing disparate treatment of male and female prisoners, but declining to reach the equal protection question); *Roubideaux v. N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 974 (8th Cir. 2009) (applying heightened review standard to statutes containing a "gender-based classification on their face"); *Pitts v. Thornburgh*, 866 F.2d 1450, 1453, 275 U.S. App. D.C. 332 (D.C. Cir. 1989) (same for prison policies).

Although the Contraband Policy was part of the record before the district court, Byrd's complaint made no reference to it and his equal protection allegation largely repeated the facts that formed the basis of his other claims. Even construing Byrd's *pro se* complaint liberally, the allegations failed to state an equal protection claim because they asserted only allegedly harmful treatment and mentioned nothing about disparate treatment, much less about the specific jail policy or gender classification in general.

See Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007) "*Pro se* complaints are to be construed liberally . . ."); *see also Pena v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) *as amended* (noting that "a liberal interpretation of a pro se civil rights complaint may not supply essential elements of the claim that were not initially pled . . ."). For that reason, we do not take issue with the ultimate ruling dismissing Byrd's equal protection claim.

As for the substantive due process claim, Byrd failed to allege or produce evidence that O'Connell or Arpaio expressed an intent to punish Byrd or that the search was unrelated to a "legitimate governmental objective." *Bell*, 441 U.S. at 538-39 (explaining that the critical inquiry is "whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word" and that, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment") (footnote reference and internal quotation marks omitted).

In the alternative, punitive intent may be inferred. *See id.* "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees." (citation and footnote omitted)). It is undisputed that the search in this case was prompted by several recent fights and suspicion of contraband. Because a search premised on such security concerns is reasonably related to legitimate goals of detention officials, *see, e.g.*, *Michenfelder v. Sumner*, 860 F.2d 328, 333 (9th Cir.

1988), no basis exists to draw an inference of intent to punish Byrd. In the absence of evidence of an intent to punish, or evidence that Maricopa's actions were unrelated to a "legitimate governmental objective," the district court properly granted judgment as a matter of law in favor of O'Connell and Arpaio on Byrd's *Fourteenth Amendment* substantive due process claim. *Bell*, 441 U.S. at 539 n.20 ("[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective.") (citations omitted).

B. Unreasonable Search and Seizure

The district court granted judgment as a matter of law in favor of O'Connell on the issue of whether the cross-gender strip search violated Byrd's right under the *Fourth Amendment* to be free from unreasonable searches. We review this decision de novo, keeping in mind that "[j]udgment as a matter of law is appropriate when the evidence presented at trial presents only one reasonable conclusion. . ." *Mangum*, 575 F.3d at 938 (citation and internal quotation marks omitted). In the context of this case, judgment as a matter of law would be appropriate only if the evidence presented at trial led inevitably to the conclusion that the cross-gender strip search was reasonable. Whether a search is reasonable under the *Fourth Amendment* requires a case-by-case "balancing of the need for the particular search against the invasion of personal rights that the search entails . . ." *Bell*, 441 U.S. at 559. The required factors for courts to consider include: (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted,"

(3) "the justification for initiating it," and (4) "the place in which it is conducted." *Id.* (citations omitted). [6]

We approach this issue by reiterating our long-standing recognition that "[t]he desire to shield one's unclothed figure from [the] view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also Michenfelder*, 860 F.2d at 333 (same); *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1985) (distinguishing cross-gender searches that "are done briefly and while the inmates are fully clothed, and thus do not involve *intimate contact with the inmates' bodies*") (emphasis added). It is not surprising that a connection has been made between cross-gender searches and the level of sexual impropriety between inmates and corrections personnel. *See, e.g.*, Nicholas D. Kristof, Op-Ed., *Kids in Crisis* (*Behind Bars*), N.Y. TIMES, Jan. 28, 2010, at A33 (discussing a "stunning new Justice Department special report" finding that cross-gender assignments in prisons foster abuse of inmates by male and female officers); Connie Rice and Pat Nolan, Op-Ed, *Policing Prisons*, L.A. TIMES, Apr. 5, 2010, at A13 (citing to the June, 2009, National Prison Rape Elimination Commission Report (Commission Report)).

In the preface to the Commission Report, The Honorable Reggie B. Walton, Chair of the Commission,

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[6] Because Byrd did not challenge the constitutionality of the Contraband Policy, and because the district court focused on the facts of the actual search conducted rather than on the provisions of the Contraband Policy, we apply the *Bell* factors rather than those articulated in *Turner v. Safley*, 482 U.S. 78, 81, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which addresses inmate challenges to regulations.

noted that the Commission was "challenged to examine problems that we wish did not exist and confronted with accounts of sexual abuse that shocked and saddened us . . ." Commission Report at vi. The Commission explicitly recognized that "searches carried out by staff of the opposite gender heighten the potential for abuse . . . . In the Commission's view, the risks are present whether the officers are male or female." *Id.* at 62 (footnote reference omitted).[7]

Although the Commission acknowledged that cross-gender supervision "can have benefits," it nevertheless determined that "[t]o prevent abuse, . . . the standard on this subject strictly prohibits non-medical staff from conducting cross-gender strip and visual body cavity searches—except in the case of emergency—because of their extraordinarily intrusive nature." *Id.* at 63.

The Commission's findings are consistent with the standards adopted by the American Correctional Association, the accrediting body for adult correctional facilities. *See* Standards For Adult Correctional Institutions (2003).

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[7] The dissent denigrates our citation to the findings of this esteemed body of experts, accusing us of failing to defer to the judgment of the prison officials. *See* Dissenting Opinion, p. 393 n.2. Our response is two-fold: (1) There is nothing nefarious or unusual about citing to secondary sources to illuminate our analysis, *see, e.g., United States v. Weber*, 451 F.3d 552, 561 n.13 (9th Cir. 2006) (listing cases relying on secondary sources to explain the court's analysis); and (2) the Maricopa County officials never exercised their "collective wisdom" in this case to decide that cross-gender strip searches were in order. In fact, the officials denied that any strip search was ever conducted. It would be strange indeed if the officials in their "collective wisdom" ordered cross-gender strip searches in this instance when the "collective wisdom" memorialized in the written policy expressly prohibits cross-gender strip searches.

Section 4-4194 addresses cross-gender strip searches, articulating the standard as follows:

> Written policy, procedure and practice provide that, except in emergency situations, visual inspections of inmate body cavities are conducted by officers of the same sex, in private . . .

Id. at 53.

Applying the *Bell* factors in the context of our precedent recognizing the privacy interest of inmates in their personal dignity, giving credence to the compelling findings made by the Commission, and acknowledging the applicable accrediting standards, we conclude that the cross-gender strip search of Byrd was unreasonable as a matter of law. O'Connell touched Byrd's inner and outer thighs, buttocks, and genital area with her latex-gloved hand through very thin boxer shorts. She moved his penis and scrotum in the process of conducting the search. The scope of this intrusion totally thwarted any desire on Byrd's part to "shield [his] unclothed figure from [the] view of strangers . . . of the opposite sex . . ." *York*, 324 F.2d at 455. The scope of the intrusion in this case far exceeds searches we have previously sanctioned and weighs in favor of a finding of unreasonableness.

In *Grummett*, 779 F.2d at 493, 495, we upheld a system of assigning female officers within a correctional facility such that they occasionally viewed male inmates in various states of undress and regularly conducted routine pat-down searches of inmates that did not involve intimate contact with the inmate's body. We expressly noted that "female officers [were] not assigned positions in which they *conduct or observe strip or body cavity searches.*" *Id. at 495* (emphases added). Although the dissent characterizes

the search of Byrd as a pat-down search, *see* Dissenting Opinion, p. 399, we offered a different description of a pat-down search in *Grummett*. There, we defined pat-down searches as searches "done briefly and while the inmates are fully clothed, and thus do not involve intimate contact with the inmates' bodies." *Grummett*, 779 F.2d at 496. In contrast, Byrd was barely clothed at all, and it is undisputed that the female officer twice touched Byrd's penis and scrotum, and searched inside his anus.

In *Michenfelder*, 860 F.2d at 334, we reiterated that "infrequent and casual observation, or observation at [a] distance, . . . are not so degrading as to warrant court interference" (citing *Grummett*, 779 F.2d at 494-95) (parallel citations omitted). Our holding in *Michenfelder* offers no support for a cross-gender strip search. If the panel in *Michenfelder* intended to approve cross-gender strip searches, it would have distinguished *Grummett*, rather than citing the case in support of the panel's ruling.

None of the other cases cited by our colleagues, *see* Dissenting Opinion, p. 395-96, purports to approve cross-gender strip searches in the absence of an emergency. Indeed, neither *Bell*, 441 U.S. at 559-60; *Rickman v. Avaniti*, 854 F.2d 327, 328 (9th Cir. 1988); nor *Thompson v. Souza*, 111 F.3d 694, 700 (9th Cir. 1997), involved cross-gender strip searches, the issue we address in this case.

The manner in which the search was conducted weighs in favor of a determination of unreasonableness. Byrd was searched by a female cadet who was dressed in jeans and a white t-shirt. Other than the name printed on the back of the t-shirt, the officer who conducted Byrd's search was unidentified. Ten to fifteen non-participating officers watched the strip

search, and at least one person videotaped the search. Although the dissent relies on the fact that the search was conducted "professionally," *see* Dissenting Opinion, p. 396, we have consistently recognized the "'frightening and humiliating' invasion" occasioned by a strip search, "even when conducted 'with all due courtesy.'" *Way*, 445 F.3d at 1160, *quoting Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984) (per curiam). Furthermore, the dissent's reliance on the jury's finding that the manner of O'Connell's search was appropriate because O'Connell "did not intentionally squeeze or knead Byrd's penis or scrotum or improperly touch his anus through his boxer shorts," Dissenting Opinion, p. 397, ignores the district court's ruling that the cross-gender aspect of the search was constitutional as a matter of law. Thus, the jury was not deciding whether the manner of the search was appropriate despite being performed by *a member of the opposite sex*.

The justification for conducting the search weighs in favor of a determination of reasonableness. It is undisputed that the search was initiated due to several recent fights and suspicion of contraband. These circumstances constituted valid reasons to search the inmates, even though no immediate emergency existed. *See Thompson*, 111 F.3d at 700 (noting that the purpose of the search was to "detect illicit drugs"); *see also Michenfelder*, 860 F.2d at 332-33 (recognizing that a search for contraband constitutes adequate justification). Nevertheless, although valid reasons to search the inmates existed generally, there was no justification given for conducting a cross-gender strip search. The dissent glosses over this distinction when emphasizing the jury's finding that there were valid reasons to search the inmates. *See* Dissenting Opinion, p. 393-94. The jury had been specifically

instructed not to consider the cross-gender element of the search, and therefore the jury's finding that a search was justified does not amount to a finding that a search *by a woman* was justified.

The final *Bell* factor, the place of the search, similarly weighs in favor of a finding of reasonableness. Byrd was searched in the day room, a common area. Other inmates were present, making it less likely that improper conduct would occur. *See Thompson*, 111 F.3d at 701 (upholding visual strip search of inmate that took place on the tier just outside the inmate's cell within view of other prisoners).

Although the last two factors weigh in favor of a determination of reasonableness, the effect of the first two factors is so extreme that a conclusion of unreasonableness is compelled. Courts throughout the country have universally frowned upon cross-gender strip searches in the absence of an emergency or exigent circumstances.[8]

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[8] The dissenting opinion minimizes the intrusiveness of the search by describing it as a "pat-down of a partially-clothed male inmate." Dissenting Opinion, p. 395. However, the facts of this case clearly reflect that more than a "pat down" occurred. We have defined a "pat-down search" as one involving no intimate contact with the inmate's body. *Grummett*, 779 F.2d at 495-96. In contrast, Byrd was subjected to a search that involved twice moving his penis and scrotum aside and separating the cheeks of his buttocks to search inside his anus. Neither was Byrd partially clothed, legally speaking. Rather, he was wearing only pink, nearly see-through underwear. In most jurisdictions within this circuit, one could not appear in public dressed, (or more precisely un-dressed) in that manner. *See, e.g.*, Ariz. Rev. Stat. § 13-3501(4) (defining "nudity" as "the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering . . ."); Haw. Rev. Stat. § 712-1210 (defining "nude" as unclothed or in attire, including

In *Cookish v. Powell*, 945 F.2d 441, 442 (1st Cir. 1991) (per curiam), the First Circuit resolved a civil rights complaint alleging that prison officials violated an inmate's right under the *Fourth Amendment* to be free from unreasonable searches. The inmate's claim was predicated on the fact that "female correctional officers supervised and/or observed him during a visual body cavity search." *Id.* (footnote reference omitted). It was undisputed that the search occurred during "an emergency situation." *Id.* at 448. Plaintiff himself described the prison conditions as a "riot." *Id.* at 444. Understandably, prison officials commenced visual body cavity searches of inmates "to ensure that the inmates were not carrying weapons, matches, combustibles or other contraband . . ." *Id.* at 446 n.7. As in this case, the Plaintiff did not challenge the reasonableness of the search *per se* or the manner in which the search was conducted. *See id.* at 446. Rather, similar to Byrd, the Plaintiff in *Cookish* asserted a violation of his constitutional rights primarily because a female lieutenant was involved, supervising the visual body cavity search from approximately five feet away. *See id.* at 445.

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but not limited to sheer or see-through attire, so as to expose to view any portion of the pubic hair, anus, cleft of the buttocks, genitals . . ."). Indeed, the dissent's characterization is inconsistent with *Grummett*, 779 F.2d at 496, in which we approved cross-gender searches "done . . . while the inmates are *fully clothed*, and thus *do not involve intimate contact with the inmates' bodies*." (emphasis added).

If the search conducted were in fact a pat-down search of a partially clothed inmate, we would probably agree that the search was reasonable. However, because Byrd was subjected to a cross-gender strip search while nearly nude, we conclude that the search was patently unreasonable.

The First Circuit reiterated its recognition "that a severe if not gross interference with a person's privacy occurs when guards conduct a visual inspection of body cavities." *Id.* at 446 (citation, alteration and internal quotation marks omitted). The court also explained that:

> Certainly by the time of this search in 1987, the trend, if not the clearly established law, was that an inmate's constitutional right to privacy is violated when guards of the opposite sex regularly observe him/her engaged in personal activities, such as undressing, showering and using the toilet.

Id. (citations omitted).

The First Circuit summarized the state of the law governing cross-gender searches as of late 1987:

> (1) inadvertent, occasional, casual, and/or restricted observations of an inmate's naked body by a guard of the opposite sex did not violate the *Fourth Amendment* and (2) if the observation was other than inadvertent, occasional, casual, and/or restricted, such observation would (in all likelihood) violate the *Fourth Amendment*, *except* in an emergency condition.

Id. at 447 (emphasis in the original).

In sum, almost twenty years ago, the First Circuit ruled, in no uncertain terms, that visual observation of a nude male by a female corrections officer "would (in all likelihood)," violate that inmate's constitutional right to be free from unreasonable searches. *Id.* It is notable that, in determining that the officers involved were entitled to qualified immunity, the First Circuit focused on the emergency conditions surrounding the search. *See id.* at 448 ("The caselaw supports the conclusion that, *in an emergency situation*, a visual

body cavity search conducted within the view of a guard of the opposite sex, even if other than an inadvertent and/or restricted view, would not violate an inmate's *Fourth Amendment* right.") (citation omitted) (emphasis added).

In 1981, the Fourth Circuit similarly recognized the inappropriateness of cross-gender strip searches. *See Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) ("[M]ales subject to frisk *searches by female guards during which the genitals are touched and felt through clothing* [are] entitled to injunctive relief.") (citation omitted) (emphasis added). This description by the Fourth Circuit fits the facts of this case perfectly. The professionalism with which the search is conducted in no way changes the consistent depiction of a cross-gender strip search in the absence of an emergency as violative of *Fourth Amendment* principles.

In 1999, the Fifth Circuit decided that an inmate stated a valid *Fourth Amendment* claim when the inmate filed a civil rights action alleging "multiple strip and body cavity searches performed by a female officer . . ." *Moore v. Carwell*, 168 F.3d 234, 235 (5th Cir. 1999). In reaching its conclusion, the Fifth Circuit distinguished a prior case holding "that the mere *presence* of female officers during a strip search of prisoners during *emergency circumstances* did not violate the *Fourth Amendment*." *Id.* at 236 (citation omitted) (emphases in the original). As with the other circuits, the Fifth Circuit considered the lack of an emergency a crucial factor in support of the existence of a constitutional violation stemming from a cross-gender strip search. The Fifth Circuit also considered the fact that male officers were present to conduct the search. *See id.* at 237.

In 1994, the Seventh Circuit decided *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994). Canedy sued the corrections facility where he was housed, asserting that his privacy rights were violated when two female guards "strip searched him" "during a shakedown of his housing unit." *Id.* at 184. Canedy also alleged that the violation could have readily been prevented due to the fact that ten male officers were nearby at the time. *See id.*

The district court dismissed Canedy's Complaint for failure to state a claim. The district court determined that any privacy rights possessed by Canedy were outweighed by the prison's interest in providing equal employment opportunities for female officers. The district court specifically ruled:

> If female guards are to be given equal opportunity for employment and promotion, it is necessary to allow them to observe male prisoners and conduct searches just as male officers would. To exclude females from observing or participating in all aspects of guard work could prevent them from gaining the experience they need to advance to higher positions, and bar them from assuming those positions that require monitoring of inmate searches or other activities in which inmates are unclothed.

Id. (citation omitted).

As a preliminary matter, the Seventh Circuit acknowledged the general consensus that a strip search is "one of the clearest forms of degradation in Western Society . . ." *Id.* at 185 (citation and alteration omitted). The Seventh Circuit also recognized that the indignity is multiplied when one's body is exposed to a member of the opposite gender. *See id.* (referencing *York*, 324 F.2d at 455).

Against that background, the Seventh Circuit considered the invasion of the inmate's privacy and the employment rights of the female corrections officers. Rather than agreeing that the employment rights of the female officers trumped the privacy rights of the inmates, the Seventh Circuit concluded that the privacy interests of the inmate must be recognized *and* accommodated. *See id.* at 187. One accommodation cited with approval by the Seventh Circuit was excluding the genital area when conducting cross-gender searches. *See id.*

The Seventh Circuit characterized Canedy's complaint as one alleging that he was subjected to cross-gender strip searches without any effort to accommodate his privacy interests vis á vis the prison's parallel interest in affording equal employment opportunities. *See id. at 188.* In reversing the dismissal of Canedy's Complaint, the Seventh Circuit proclaimed that "[a]lmost every federal court that has addressed this issue has come to the conclusion that the Constitution demands such an accommodation [in the absence of an emergency]"). *Id.* at 187.

In 1995, the Tenth Circuit addressed the issue of cross-gender strip searches in *Hayes v. Marriott*, 70 F.3d 1144 (10th Cir. 1995). Hayes alleged that a video-taped strip search conducted in the presence of, inter alia, female corrections officers violated his constitutional rights under the *Fourth Amendment. See id.* at 1145.

An administrative officer from the Colorado Department of Corrections (DOC) proffered the following justification for the presence of female staff:

> There is no particular DOC policy relating to use of female staff during strip searches. As a

> matter of courtesy to the inmate population, male staff members are used whenever possible. There is no indication any female staff members conducted a strip search during the dates in question. Although every effort was made to reduce the number of female staff during the search, females are an essential part of our staffing. All posts still had to be covered and females did view parts of the search while conducting their normal duties or observation duties so male staff could conduct the searches. There was no justifiable reason to totally exclude female staff from this required function. Additionally, the total absence of female staff would have alerted inmates to an impending search.

Id. at 1147 (citation omitted).

Despite the affidavit from a prison official attesting that no females actively participated in the strip search and despite the expressed staffing considerations in the affidavit, the Tenth Circuit reversed the grant of summary judgment in favor of the prison officials. *See id.* at 1147-48. In doing so, the Tenth Circuit explicitly recognized that an inmate's privacy rights may be violated by a single cross-gender strip search. *See id.* at 1147.

This litany of cases over the last thirty years has a recurring theme: cross-gender strip searches in the absence of an emergency violate an inmate's right under the *Fourth Amendment* to be free from unreasonable searches. Because the cross-gender nature of the search is a critical factor in the strip searches discussed in these cases, we cannot agree with our dissenting colleagues that the gender of the officer conducting the search is irrelevant. *See* Dissenting Opinion, p. 395. Interestingly, Maricopa

County never challenged the precept that cross-gender strip searches are constitutionally infirm in the absence of an emergency. Rather, it painstakingly attempted to establish that the cross-gender search Byrd underwent was not a strip search. Indeed, Maricopa County's policy prohibits cross-gender strip searches. The admission implicit in Maricopa County's determined effort to avoid having the search characterized as a strip search, coupled with the nearly universal opprobrium expressed in the cases addressing cross-gender strip searches, reflects the extreme degree of unreasonableness presented by the facts of this case.[9]

In this case, the indignity of the non-emergency strip search conducted by an unidentified female cadet was compounded by the fact that there were on-lookers, at least one of whom videotaped the humiliating event. For these reasons, we conclude that the cross-gender strip search, as conducted in this case, was unreasonable.[10]

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[9] We omit *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc), from this discussion because a majority of the *en banc* panel declined to address the *Fourth Amendment* issue in that case.

[10] Byrd also challenged the district court's admission of the Video Yearbook and the district court's formulation of an adverse inference instruction. However, during trial, Byrd laid the foundation for an adverse inference instruction when he questioned Arpaio about the video footage recorded on the day of Byrd's search. The district court did not abuse its discretion by admitting the videotape because Byrd opened the door to consideration of this evidence when he questioned Arpaio about the video footage. *See United States v. Osazuwa*, 564 F.3d 1169, 1173 (9th Cir. 2009) (reviewing for abuse of discretion the district court's ruling that a party opened the door for introduction of evidence). Additionally, the district court did not

IV. CONCLUSION

We readily acknowledge the deference due prison officials engaged in the admittedly difficult task of administering inmate populations. However, that deference does not extend to sanctioning a clear violation of an inmate's constitutional rights. *See Giles*, 746 F.2d at 617; *see also Hayes*, 70 F.3d at 1146 ("One of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy.") (citations, alteration and internal quotation marks omitted).

Accordingly, we hold that the cross-gender strip search performed on Byrd was unreasonable as a matter of law under the facts of this case and violated Byrd's rights under the *Fourth Amendment* to be free from unreasonable searches. We REVERSE the district court's entry of judgment as a matter of law in favor of O'Connell and Maricopa County on this claim. We REMAND this case to the district court for further proceedings consistent with this opinion.

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abuse its discretion when it declined to use the exact wording Byrd requested for the adverse inference instruction. Byrd's suggested language would have impermissibly directed the jury to reach a conclusion about a matter of disputed fact. *See Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 212 (9th Cir. 1988) (explaining that a jury instruction is adequate "even if it does not use the exact words proposed by a party . . ."); *see also Roberts v. Spalding*, 783 F.2d 867, 873 (9th Cir. 1986) (approving the district court's rejection of an instruction that directed the jury to reach a particular conclusion regarding a disputed matter of fact).

CONCUR BY: N. Randy Smith (In Part)

DISSENT BY: N. Randy Smith (In Part)

DISSENT

N.R. SMITH, Circuit Judge, concurring in part and dissenting in part, joined by KOZINSKI, *Chief Judge*, and GOULD, TALLMAN, and BEA, *Circuit Judges*:

I agree with the majority's conclusion regarding Byrd's claims under the *Eighth* and *Fourteenth Amendments*. However, (1) the deference we owe prison administrators, (2) the jury's undisputed factual findings, and (3) the relevant case law compel me to conclude that O'Connell's actions were reasonable under the *Fourth Amendment*. I therefore respectfully dissent from the contradictory analysis in the majority opinion, which held that a female officer's pat-down search of a male detainee—where there were no exigent circumstances showing the unavailability of male officers to do the search—was a violation of the detainee's *Fourth Amendment* rights.

In determining the reasonableness of a search under the *Fourth Amendment*, we must balance "the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). In *Bell v. Wolfish*, the Supreme Court directed us to consider the following four factors when evaluating the reasonableness of a search of an incarcerated person: (1) "the scope of the particular intrusion," (2) "the manner in which it is conducted," (3) "the justification for initiating it," and (4) "the place in which it is conducted." *Id.*[1] The majority correctly

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[1] Because the majority holds that the factors articulated in *Turner v. Safley*, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 96 L. Ed.

2d 64 (1987), are inapplicable to Byrd's challenge and instead focuses exclusively on the *Bell* factors, Maj. Op. 378 n.6, I too only address the *Bell* factors. It ultimately makes no difference whether we consider the factors articulated in *Turner*, however, as application of the *Turner* factors also compels a finding that O'Connell's search of Byrd was reasonable under the *Fourth Amendment*. *See Bull v. City and County of San Francisco*, 595 F.3d 964, 975-76 (9th Cir. 2010) (en banc) ("Because the Turner factors require us to give more deference to detention officials' determinations than does the balancing test in *Bell*, it is not surprising that our consideration of the *Turner* factors leads to the same conclusion."). In *Turner*, the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. In making this determination, the Supreme Court directed us to consider four factors. *Id.* at 89-91. First, we consider whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (internal quotation marks and citation omitted). As discussed more fully *infra*, it is not disputed that the prison officials had a legitimate need to initiate the searches in order to prevent the proliferation of contraband within the prison. Second, we are to consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. This factor does not apply to Byrd's *Fourth Amendment* claim; it is somewhat nonsensical to examine whether alternative means exist for Byrd to exercise his right to be free from unreasonable searches. *See Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988) ("Not all four factors will be relevant to each case. . . . [T]he second *Turner* factor . . . is much more meaningful in the *first amendment* context than the fourth or eighth . . . ."). Third, we consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. Again as discussed more fully *infra*, the County offered undisputed evidence that it did not have sufficient numbers of male detention officers to conduct searches of male inmates without the assistance of female officers. Finally, we must examine "the absence of ready alternatives [as] evidence of the reasonableness of a prison regulation." *Id.* Because we must

identifies this test and properly finds that factors (3) and (4)—justification and place, respectively—weigh in favor of a finding of "reasonableness" under the *Fourth Amendment*. Nevertheless, it erroneously concludes that factors (1) and (2)—scope and manner, respectively—vindicate Byrd's Fourth Amendment claim.

Before addressing the *Bell* factors, however, it is necessary to highlight the limited nature of our review. The Supreme Court has instructed that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* at 547. Therefore, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security and operation considerations], courts should ordinarily defer to their expert judgment in such matters." *Id.* at 540 n.23 (internal quotation marks and citation omitted). It is axiomatic that prison officials know better than a panel of judges how to run a prison. Deference to prison officials, therefore, necessarily permeates our review of their searches.[2]

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defer to the County's undisputed evidence regarding its staffing needs, we cannot conclude that there were other reasonable alternatives to the search.

[2] The majority has apparently disregarded this principle, instead relying on a Commission Report and two op-eds to form its own opinions about the logistical wisdom of the searches at issue here. Maj. Op. 378-79. Aside from the fact that the Commission Report and op-eds are not part of the record before us, there is certainly nothing to suggest that they represent the collective wisdom of administrators who understand the condi-

We are also constrained in our review by the jury's undisputed factual findings that: (1) O'Connell did not "intentionally squeez[e] or knead[ ] [Byrd's] penis or scrotum or improperly touch[ ] his anus through his underwear," and (2) O'Connell's search was "done for [an] identified security need." Tempting though it may be to paint the facts differently on appeal, the jury made these findings and Byrd has not challenged them. With these considerations in mind, I now turn to the *Bell* factors and again emphasize that the majority agrees that two of the factors—the justification for the search and place in which it was conducted—weigh in favor of finding O'Connell's search reasonable. Maj. Op. 382-83.

It is appropriate to begin the analysis by looking at the justification for initiating the search, because, in the absence of a proper justification, even the most unintrusive search is unreasonable. The prison officials initiated their searches in response to evidence that contraband was circulating in the jail in the wake of multiple fights that had broken out in Byrd's housing unit. This is not disputed. Maintaining the internal security of the prison was at stake, and the need to eliminate the possibility of dangerous contraband somewhere on a prisoner's person in such a volatile atmosphere certainly justifies initiating the type of search at issue here. *See Michenfelder*, 860 F.2d at 333 (holding that, among other things, "testimony and physical evidence . . . [of] contraband" justified the initiation of strip searches). Moreover, it is undisputed that inmates frequently attempt to

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tions at Durango Jail. Those prison administrators deserve greater deference, especially since the evaluation of the reasonableness of a search is heavily dependent on the context of each case.

conceal contraband in their body cavities, thus furthering the need for strip searches as a means of preventing the proliferation of contraband and homemade weapons within the prison. *See, e.g.*, *Bell*, 441 U.S. at 559 ("A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record . . . and in other cases."). On top of all this, the jury found that the search was done for an identified security need, which Byrd does not challenge on appeal. In light of such considerations, the prison's need to confiscate all contraband, and therefore initiate these searches, was both pressing and significant. *Id.* at 546-47 ("Central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves.") (internal quotation marks, citation, and alteration omitted).

I next note my agreement with the majority that the last *Bell* factor—the place in which the search is conducted—also weighs in favor of finding the search reasonable. *See Michenfelder*, 860 F.2d at 333 ("[W]e will not question [prison officials'] judgment that conditions in [a prison unit] reasonably require searches outside the prisoners' cells in order to protect the safety of the officers conducting them."); *see also Thompson v. Souza*, 111 F.3d 694, 697, 701 (9th Cir. 1997) (approving an intrusive strip search conducted in view of jeering inmates).

My agreement with the majority ends there, however, as a review of the remaining two *Bell* factors—the scope and manner of the search—also establishes the reasonableness of O'Connell's search of Byrd.

Relying on a string of cases that *upheld* both female officers' visual observation of unclothed males and their performing pat-down searches on males, the majority concludes that, under the first *Bell factor*, "[t]he scope of the intrusion in this case far exceeds searches we have previously sanctioned . . . ." Maj. Op. 380. The majority is wrong.

Dealing first with the scope of O'Connell's search, such search was limited to a pat-down of a partially clothed inmate in an attempt to locate contraband. The search was both reasonable and necessary to ensure prisoners at the Durango Jail were not concealing weapons or other contraband. *Cf. Bull*, 595 F.3d at 969 ("[A]rrestees' use of body cavities as a method of smuggling drugs, weapons, and items used to escape custody is an immediate and troubling problem for San Francisco jail administrators."). In evaluating the scope of a search, the searching officer's gender is irrelevant.

The Supreme Court and the Ninth Circuit have previously validated even strip searches and body cavity searches. *See, e.g., Bell*, 441 U.S. at 558-60 (validating visual inspections of body cavities as part of strip searches in the prison setting); *Thompson*, 111 F.3d 694, 700 (9th Cir. 1997) (holding body cavity searches did not violate clearly established rights under qualified immunity analysis); *Michenfelder*, 860 F.2d at 333 (approving visual strip searches in the prison setting); *Rickman v. Avaniti*, 854 F.2d 327, 328 (9th Cir. 1988) (approving strip searches in prisons). I recognize, of course, that these cases involved only visual searches and no touching (in contrast to O'Connell's search). However, it is clear that pat-down searches can be constitutional even outside of a prison setting. *See Terry v. Ohio*,

392 U.S. 1, 17 n.13, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (describing a frisk as "feel[ing] with sensitive fingers every portion of the prisoner's body . . . the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet" (internal quotation mark omitted)). Pat-down searches are also less intrusive than strip searches. *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). The officers here searched the prisoners professionally,[3] following a procedure that minimized physical contact to the extent possible. O'Connell searched Byrd over his boxer shorts, and he doesn't claim she ever looked underneath them. The entire search took no more than a minute. Thus its scope did not "far exceed[ ]" what we have previously sanctioned. *Contra* Maj. Op. 380.

The final *Bell* factor—the manner of O'Connell's search—gives me greater pause. Not lightly do I find reasonable a female officer's probing search of a male detainee wearing only thin boxer shorts. Nevertheless, I believe the precedent and the facts compel this result, unsavory to our sensibilities though that result may be.

I first note "our prior case law[, which] suggests that prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely

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[3] The majority's assertion that it makes no difference that a search was done in a professional manner is unconvincing. Maj. Op. 381-82, 385. The court in *Grummett* specifically noted (three times) that female guards' searches were done in "in a professional manner." *Grummett v. Rushen*, 779 F.2d 491, 495-96 (9th Cir. 1985).

limited." *Jordan v. Gardner*, 986 F.2d 1521, 1524 (9th Cir. 1993) (en banc). Against that backdrop, we now review our other precedent: (1) female officers may pat down the groin area of fully clothed male inmates, *Grummett*, 779 F.2d at 496; and (2) female officers may observe unclothed male inmates in their cells and in the showers, *Michenfelder*, 860 F.2d at 334. Admittedly, neither of these precedents covers the current situation—a female officer's pat-down of a partially-clothed male inmate. Under the circumstances presented here, however, there is no meaningful difference between Byrd's search and what we have previously upheld. O'Connell never saw Byrd's exposed groin area or his anus, in contrast to the female officers in *Michenfelder*, and the search was done in a professional, swift, and appropriate manner that involved no touching of the flesh under Byrd's boxer shorts. *See Grummett*, 779 F.2d at 496 (validating searches where, among other things, the searches are "done briefly . . . [and] are performed by the female guards in a professional manner"). Moreover, the jury found that O'Connell did not intentionally squeeze or knead Byrd's penis or scrotum or improperly touch his anus through the boxer shorts and that O'Connell's search was done for an identified security need. Again, Byrd has not challenged these findings.

In addition, the County has offered undisputed evidence that the County did not have sufficient numbers of male detention officers to conduct searches of male inmates without the assistance of female officers.[4] Thus, even if it may seem odd to utilize a

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[4] The majority argues that Byrd disputed the need to utilize female officers because he testified that male detention officers were present, but did not conduct the search. Maj. Op. 371 & n.2. The majority claims that, as in *Moore v. Carwell*, 168 F.3d

female officer to conduct a pat-down of a male inmate when other male officers are present, the realities of the prison's staffing needs justify such searches. *See Michenfelder*, 860 F.2d at 334 ("[R]equiring [female employees] to be replaced by males for the duration of strip searches, would displace officers throughout the prison."); *Grummett*, 779 F.2d at 496 ("To restrict the female guards from positions which involve occasional viewing of the inmates would necessitate a tremendous rearrangement of work schedules, and possibly produce a risk to both internal security needs and equal employment opportunities for the female guards."). This is particularly true since the 10,000 detainees in the Maricopa County system are

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234, 237 (5th Cir. 1999), we should credit Byrd's testimony that some male officers were not participating in the search as evidence that female officers were not needed to perform the search. However, in *Moore*, the court was required to assume Moore's allegations were true when reviewing a motion to dismiss. *Id.* at 236. We are not so constrained in our review; instead, we must consider all the evidence produced at trial. While Byrd testified that not all male officers present conducted the searches, he did not (and could not) testify as to the staffing necessary to safely conduct a search of approximately 90 prisoners and their living quarters. Moreover, the majority's argument that female officers were not necessary for the search was contradicted by testimony from both O'Connell and Captain Peterson. O'Connell testified that having additional officers present was necessary because "[t]here is always a threat" of violence in such situations. Captain Peterson testified that prison officials "don't have the luxury" of having enough male detention officers to search the jail facility. Therefore, they must rely on female officers. He also testified that he could not pull in additional male officers from other facilities to have enough male staff to conduct such searches. Under *Bell*, we are required to defer to the expert judgment of prison officials as to how to maintain prison safety and order—including who should conduct searches and how many officers are needed.

searched at least daily, and often several times a day. To disallow all female officers from conducting these searches anytime a male officer is present would handicap the female officers as security personnel and perpetuate sexist notions that a female is only useful when a male is not available. Instead of converting Durango Jail into a target for equal employment litigation, I defer to the prison officials' reasoned and sensible judgment on these matters.

In order to provide a basis for its decision, the majority terms this search a strip search, rather than a pat-down search. This is error. True, this search differed somewhat from the prison's definition of a "frisk (body) search," because more than Byrd's socks and shoes were removed. However, it is undisputed that it involved only an inspection of Byrd's (already removed) clothing and "feeling the contours of his clothed body." O'Connell testified that at no point did she pat down or touch any unclothed areas. Thus, the search is more accurately described as a "pat-down," since a "strip search" involves a "*visual scan* of the inmate's body after *all* clothing has been removed." Indeed, the strip searches in the cases relied on by the majority were visual inspections of naked inmates. *See Moore v. Carwell*, 168 F.3d 234, 236 (5th Cir. 1999) (male inmate "being viewed naked by a female [officer]"); *Canedy v. Boardman*, 16 F.3d 183, 185, 186 n.2 (7th Cir. 1994) (female guards' visual observations of male inmate's "naked body" prohibited, but pat-down searches constitutional); *Hayes v. Marriott*, 70 F.3d 1144, 1145-47 (10th Cir. 1995) (Visual body cavity search of male inmate in presence of non-essential female staff. The court noted "the *Fourth Amendment* does not require the complete exclusion of members of the opposite sex from areas in which searches are conducted"); *Cookish v. Powell*,

945 F.2d 441, 444-45 (1st Cir. 1991) (male inmate "had to remove every item of clothing" in view of supervising female officer); *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1981) (female inmate had "underclothing . . . forcefully removed" with male guards present); *see also Sec. and Law Enforcement Employees, Dist. Council 82 v. Carey*, 737 F.2d 187, 192 nn.3-4 (2d Cir. 1984) (distinguishing between "strip frisks" (requiring the person being searched to reveal body cavities), visual examinations of naked persons, and pat frisks); *Cookish*, 945 F.2d at 444 n.5 ("A 'strip search,' . . . refers to an inspection of a naked individual"). None of these "strip search" cases involved partially clothed inmates.

The majority's description of this search as a strip search allows it to discount this court's precedent relevant to the case at hand. *Grummett* is on point. This court held that "routine pat-down searches, which include the groin area, and which are otherwise justified by security needs, do not violate the [F]ourteenth [A]mendment because a correctional officer of the opposite gender conducts such a search." 779 F.2d at 495; *see id.* at 496 (finding no *Fourth Amendment* violation). The majority repeatedly distinguishes *Grummett* because it feels that, unlike *Grummett*, this case involved "intimate contact with the inmate's body." Maj. Op. 383 n.8. This, however, ignores the nature and purpose of a pat-down search. A pat-down is done to detect contraband that may be taped to the contours of an inmate's body, including the genital area. One has to apply enough pressure to contact the areas being searched, and to "be able to feel something that's on the [area searched]."

Given that the purpose of the search is to feel for contraband, the majority's attempt to distinguish

Grummett solely on the thickness or extent of the clothing is unconvincing. In order to be effective, the searcher must be able to feel the inside thigh and perineum. On an inmate in street clothes, this may require more pressure, but results in the same contact in the same area. In both cases, no skin to skin contact was made; both searches were only over clothed areas. Both searches were of the same groin area. Both searches were brief and conducted for legitimate security purposes. 779 F.2d at 496. Given the area, nature, and purpose of the search, it would be unreasonable to presume that the female guards in *Grummett* did not face the same challenges O'Connell did.

Moreover, even if this were a strip search, this court's precedent does not suggest that a cross-gender strip search is unconstitutional where the genitals remain covered throughout the procedure. After considering *Grummett*, *Jordan*, and *Michenfelder*, this court noted that "it is highly questionable even today whether prison inmates have a *Fourth Amendment* right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex." *Somers v. Thurman*, 109 F.3d 614, 622 (9th Cir. 1997). This is even more true when the special concern about "involuntary exposure of [one's genitals] in the presence of people of the other sex" is not implicated. *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993).

Lastly, the majority seems to rest its analysis of the "manner" factor on the fact that O'Connell was unidentified to Byrd and was wearing jeans and a t-shirt and that there were ten to fifteen non-participating officers present. Maj. Op. 381-82. Even

putting aside our heightened deference to prison officials, the majority does not explain how the number of officers, their attire, or their lack of identification somehow outweigh the jury's finding that the search was appropriate,[5] the professional nature of the search, or the County's undisputed need to utilize its female officers (or even how these facts are relevant). Nor were such facts unreasonable in any event. O'Connell testified that Byrd was allowed to ask her questions but didn't. He talked to other officers after the search was over, and they explained that cadets had helped conduct the search. It was also not unreasonable for some officers not to participate in the search. We see no reason to intimate that a search is constitutionally suspect because not every

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[5] The majority explains that this is relevant because of the "humiliation" of "exposing one's nude body to strangers." Maj. Op. 370 n.1. However, it does not explain how identification or uniforms would make the cadets not "strangers." Given their matching white shirts, supervision by other guards, and participation in the search, it was surely apparent that the cadets were present in an official capacity, not just strangers off the street. Moreover, contrary to the majority's assertion, Byrd was not nude. Maj. Op. 370, 383 nn.1, 8. There is no basis in the record for its assertion that the pink boxers were sheer, see-through, or even nearly see-through (which really means not see-through). The majority's reference to Arizona and Hawaii law for the proposition that appearing in public dressed in boxer shorts would be illegal is also unfounded. First, the laws set standards for obscenity, not indecent exposure. Second, and more importantly, the record is clear that at no point did O'Connell see any area covered by the boxer shorts, including the genital area. Therefore, the oft-quoted "desire to shield one's unclothed figure from the view of strangers," *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963), was satisfied in this case.

single officer present laid hands on the prisoner. Surely this cuts the other way, if it cuts at all.[6]

The majority's holding on this point illustrates the risks of not giving proper deference to prison officials. As part of the prison's search for contraband, officials ordered more than ninety inmates out of their cells into the common area. In contrast, there were only twenty-five to thirty Academy cadets and ten to fifteen uniformed detention officers present. At best, the prison officials were outnumbered two to one. Importantly, judges are instructed not to intrude into that sphere of decision making. Deciding to accelerate the searches by using additional assistance from female cadets hardly seems unreasonable in these circumstances. I question second-guessing prison administrators when such credible threats to officers' safety are present. Indeed, I would think such security concerns vindicate the Supreme Court's instruction to defer to prison administrators—an instruction that it seems the majority has too hastily disregarded.

In sum, we are guided by our precedent and bound by Supreme Court precedent, the jury's undisputed factual findings, and our deference to prison officials' expertise in these matters. Balancing the four *Bell* factors in light of these limitations, I conclude that O'Connell's search of Byrd was reasonable under the *Fourth Amendment*, and I respectfully dissent from the contradictory analysis in the majority opinion.

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[6] The majority also relies on the fact that one or two people in the room, about 30 feet away from Byrd, had video cameras. Maj. Op. 381-82. But we have previously found that some strip searches were reasonable even when transmitted to video screens monitored by guards of the opposite sex. *Michenfelder*, 860 F.2d at 329-30, 333.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-16640

CHARLES EDWARD BYRD,
Plaintiff-Appellant,

v.

MARICOPA COUNTY SHERIFF'S DEPARTMENT; JOSEPH M. ARPAIO; KATHLEEN O'CONNELL; AUSTIN PETERSON; DURANGO JAIL,
Defendants-Appellees.

October 2, 2008, Argued and Submitted, Pasadena, California

May 18, 2009, Filed

JUDGES: Before: Ferdinand F. Fernandez, Consuelo M. Callahan, and Sandra S. Ikuta, Circuit Judges. Opinion by Judge Ikuta; Partial Concurrence and Partial Dissent by Judge Fernandez.

OPINION BY: Sandra S. Ikuta

OPINION

IKUTA, Circuit Judge:

Charles Byrd, a former pretrial detainee in the minimum-security Durango Jail in Maricopa County, Arizona, brought this action under 42 U.S.C. § 1983

against Maricopa County Sheriff Joseph Arpaio in his personal and official capacities, Kathleen O'Connell, a former cadet at the Maricopa County Sheriff's Office Training Academy, and Captain Austin Peterson, O'Connell's supervisor.[1] Byrd contends that a search of his housing unit, during which a partial strip search and pat down of his groin area was conducted by a female training cadet despite the availability of male detention officers nearby, violated his constitutional rights. The district court dismissed Byrd's equal protection claim and granted judgment as a matter of law against Byrd on aspects of his *Fourteenth* and *Fourth Amendment* claims. After a jury resolved certain factual disputes relating to the search, the district court entered judgment in favor of all defendants. Given the facts and procedural posture of this case, we affirm the judgment of the district court.

I

A

Byrd was a pretrial detainee at minimum-security Durango Jail in Maricopa County, Arizona. In October 2004, there had been multiple fights in Byrd's housing unit, and officials suspected that contraband was circulating in the jail. In order to conduct a coordinated search of Byrd's entire housing

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[1] We construe Byrd's complaint against Arpaio in his official capacity as a suit against Maricopa County. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985); *see also Ctr. for Bio-Ethical Reform v. Los Angeles County Sheriff Dept.*, 533 F.3d 780, 786 (9th Cir. 2008) (official capacity suit against county sheriff was equivalent to suit against county). We refer to individual defendants by name when appropriate, and otherwise refer to defendants collectively as "County."

unit, jail supervisors requested assistance from the Maricopa County Sheriff's Office Training Academy (Academy) cadets. On October 28, jail officers carrying taser and pepper guns entered Byrd's cell and ordered him to remove all his clothing except his boxer shorts, which were made of thin material. The officers ordered Byrd to walk into an open common area known as the "day room," where 25 to 30 Academy cadets and 10 to 15 uniformed detention officers were present. The cadets wore jeans and white T-shirts with their last names printed on the back in black lettering. Approximately one third of both the cadets and officers in the room were female. At least one person with a hand-held camera was present in the day room.

Jail officials directed five or six inmates at a time to stand in front of a row of waiting cadets in order to be searched. When it was Byrd's turn, the officers ordered Byrd to walk over to the cadets, stand facing away from them, raise his arms above his head, and spread his legs. O'Connell approached Byrd from behind and conducted the search as follows: She ran her hands across the waistband of Byrd's boxer shorts and pulled the waistband out a few inches to check for anything hidden or taped inside; she did not look into his boxer shorts. She lightly frisked over his boxer shorts and down the outside of his thigh, stopping at the bottom of the shorts. Through the boxer shorts, O'Connell moved Byrd's scrotum and penis with the back of her hand in order to frisk his groin, applying light pressure to feel for contraband. She then placed her hand at the bottom of his buttocks, ran it upward over his boxers, and separated the cheeks to search for any contraband

taped, placed, or hidden inside.[2] The record indicates the search of Byrd was brief. O'Connell demonstrated the search to the jury and testified that it lasted between 10 and 20 seconds, while Byrd testified that it lasted 60 seconds.

Under the County's policies and customs, female officers and cadets are not permitted to observe or conduct cross-gender strip searches if all of an inmate's clothing has been removed. They are, however, permitted to observe and conduct searches, whether visual or tactile, if an inmate is wearing underwear, which at Maricopa County's detention facilities are standard-issue boxer shorts. Females are not permitted to look into a male inmate's underwear when conducting a pat down and partial strip search.

B

After the search, Byrd filed an inmate grievance form with the Maricopa County Sheriff's office. He subsequently filed additional grievances with the County, none of which resulted in remedial action. Byrd filed a pro se complaint in district court on November 26, 2004, and amended it June 14, 2005, alleging that the search violated: (1) his *Fourth Amendment* right to be free from unreasonable

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[2] Although the parties dispute whether this search constituted a "strip search," we have referred to a search as a "pat down and partial strip search," and simply as a "strip search," when a suspect was stripped to her underwear and officers felt the suspect's groin area through the underwear. *United States v. Gonzalez-Rincon*, 36 F.3d 859, 861 (9th Cir. 1994). Because Byrd was not completely unclothed, but was in his boxer shorts and the search physically explored his genital region, we will refer to the search as a "pat down and partial strip search" or, for the sake of brevity and convenience, a "strip search."

searches; (2) his substantive due process right to be free from punishment;[3] and (3) his *Fourteenth Amendment* right to equal protection of the laws. Byrd alleged that his Fourth Amendment and substantive due process rights were violated because O'Connell caused "wanton and unnecessary infliction of pain" when she "grabbed his genitals twice, then ram[m]ed her index finger through the crack of his butto[cks]." He also alleged that there was no need for a female cadet to touch him because there were more than ten male detention officers present who could have performed the search. In addition, he claimed that jail officials were aware of, but deliberately indifferent to, the psychological pain that a cross-gender body search was likely to cause. Byrd alleged that the search caused him "public humiliation" and "psychological trauma," among other injuries.

The County moved for summary judgment, arguing that "Officer O'Connell conducted the frisk (body) search of Plaintiff in accordance with MCSO policy

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[3] Byrd's pro se complaint alleged that his *Eighth Amendment* rights had been violated. Because at the time of the search Byrd was a pretrial detainee, the district court correctly re-characterized this claim as one alleging that the County violated Byrd's substantive due process rights under the *Fourteenth Amendment*. *See Bell v. Wolfish*, 441 U.S. 520, 537 n.16, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) ("The Court of Appeals properly relied on the *Due Process Clause* rather than the *Eighth Amendment* in considering the claims of pretrial detainees. Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be "cruel and unusual" under the *Eighth Amendment*."). We refer to this claim as a *Fourteenth Amendment* substantive due process claim throughout.

DH-3; in the presence of her supervisor, Captain Peterson; and in the process demonstrated and instructed detention officers in the proper manner in which to conduct such a search for contraband."

The district court issued an order dismissing part of the complaint, and granting in part and denying in part the County's motion for summary judgment. Under its obligation to dismiss sua sponte certain complaints brought by prisoners proceeding in forma pauperis, *see* 28 U.S.C. § 1915(e)(2)(B), and certain claims regarding conditions of confinement, *see* 42 U.S.C. § 1997e(c), the district court dismissed Count II, which had alleged an equal protection violation, for failure to state a claim.

The district court denied the County's motion for summary judgment on Byrd's *Fourth Amendment* and *Fourteenth Amendment* substantive due process claims.[4] The court held that the County was not entitled to summary judgment on Byrd's *Fourth Amendment* claim because it had not established that the search was "necessary to security or that it furthered a legitimate penological interest," and was not entitled to summary judgment on Byrd's substantive due process claim because it had not briefed the issue.

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[4] The district court also granted the County's motion in part, holding that under 42 U.S.C. § 1997e(e), Byrd could not recover for mental or emotional harm, but he could recover compensatory, nominal, and punitive damages premised on a violation of his *Fourth Amendment* and substantive due process rights, to the extent they were actionable. This holding is not at issue on appeal.

C

The district court appointed trial counsel for Byrd. While proceeding pro se, Byrd had made no discovery requests. When Byrd's newly appointed counsel learned that a person with a hand-held camera was present on the day in question, he asked the County to produce footage that may have been shot. The County initially stated it was unaware of any video recording of the search. Shortly before trial, however, O'Connell informed defense counsel that the Academy had given the cadets a Video Yearbook, which showed approximately one minute of footage from the day of the search. The County stated that it did not have the rest of the videotape footage, and that it assumed it had been destroyed pursuant to the County's retention policy. The Video Yearbook did not include any footage of Byrd or of O'Connell performing searches.

Byrd asked the court to exclude all references to the Video Yearbook on the grounds that the brief surviving footage did not show Byrd or O'Connell, and that it would be misleading and prejudicial because it highlighted the cadets in a favorable light. In the alternative, Byrd requested an adverse inference jury instruction that would state the videotape established that the search was done solely for training purposes, and that O'Connell groped Byrd's private parts. The district court reserved its decisions on whether to exclude the Video Yearbook, and on whether to give the requested instruction, pending the evidence produced at trial.

At trial, Byrd's counsel questioned Sheriff Arpaio about the video footage. The district court held that this opened the door to the introduction of the Video

Yearbook. Both the County and Byrd subsequently showed the video to the jury.

At the conclusion of testimony, both parties moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.[5] The district court granted judgment as a matter of law in favor of Captain Peterson (O'Connell's supervisor) on the ground that he did not have any role at Durango Jail at the time of the search. Byrd does not challenge this ruling on appeal.

Next, because Byrd had not presented any evidence that Arpaio had instituted an unconstitutional policy (*i.e.*, a policy of conducting searches for an unconstitutional purpose or in an unconstitutional manner), and there was no allegation that Arpaio had personally conducted or supervised the search, the district court held that Arpaio was entitled to judgment as a matter of law, notwithstanding the remaining factual disputes.

This left one remaining defendant, Cadet O'Connell. The district court concluded that the factual disputes over the purpose of the search and the manner in which it was conducted should be decided by the jury. The court held that if the jury

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[5] Rule 50 provides:

> If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50(a)(1).

found that the County had conducted the search for an identified security need, and if the jury found that O'Connell had not conducted the search in an inappropriate manner (i.e., by intentionally squeezing or kneading Byrd's penis or scrotum, or improperly touching his anus through his underwear), then the search would violate neither Byrd's substantive due process nor his *Fourth Amendment* rights as a matter of law. The court denied Byrd's cross motions for judgment as a matter of law.

In light of these rulings, the district court submitted three issues to the jury: (1) whether Byrd had proved that O'Connell "deprived him of his right against unreasonable search[es] by intentionally squeezing or kneading his penis or scrotum or improperly touching his anus through his underwear"; (2) whether O'Connell deprived Byrd of due process of law by taking any inappropriate actions during the search,[6] which actions had inflicted pain on Byrd, and which infliction was wanton; and (3) whether O'Connell violated Byrd's right against unreasonable searches "by conducting a search not done for [an] identified security need." The district court instructed the jury that it could draw an inference adverse to a party who destroyed evidence, but declined to give the instruction proposed by Byrd's counsel.

The jury found against Byrd on each of the issues, and the court entered judgment for all defendants. This timely appeal followed. On appeal, Byrd chal-

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[6] As in the first issue, the jury was instructed to determine whether "O'Connell intentionally squeezed or kneaded [Byrd's] penis or scrotum or improperly touched his anus through his underwear."

lenges the district court's dismissal of his equal protection claim, certain evidentiary rulings, and its grant of judgment as a matter of law in favor of Arpaio and O'Connell as to the constitutionality of the search.[7]

II

We first address whether the district court erred in its sua sponte dismissal under 28 U.S.C. § 1915(e) of Byrd's equal protection claim. The Prison Litigation Reform Act states that "[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). We review de novo a district court's decision to dismiss for failure to state a claim under 28 U.S.C. § 1915(e). *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). "Factual allegations in the complaint are taken as true and all reasonable inferences are drawn in the plaintiff's favor." *Barrett v. Belleque*, 544 F.3d 1060, 1061 (9th Cir. 2008) (per curiam).

In dismissing Count II, the district court held that Byrd had "failed to allege that he is a member of a suspect class," and that Byrd "had neither alleged nor demonstrated that Defendants' conduct was the result of purposeful or invidious discrimination, or that the conduct bore no rational relationship to a legitimate government interest."

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[7] We reject the County's assertion that the issues on appeal are limited by rules governing in forma pauperis proceedings. *See* 28 U.S.C. § 1915. Byrd did not proceed in forma pauperis in bringing his appeal, and this court's records reflect that all appropriate fees have been paid.

We have held that "§ 1983 claims based on Equal Protection violations must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998). Even construing Byrd's pro se complaint liberally, *see Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987), it fails to allege facts susceptible to an inference that "defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class," *Barren*, 152 F.3d at 1194. While Byrd alleged that a female searched him, he fatally "failed to allege that defendants' acts or omissions were motivated by discriminatory animus toward" male prisoners. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001); *see also Rosenbaum v. City & County of San Francisco*, 484 F.3d 1142, 1152-53 (9th Cir. 2007). Accordingly, the district court did not err in dismissing Count II of the complaint.

III

We next address Byrd's challenges to the district court's evidentiary rulings. We review a district court's evidentiary decisions, which include whether and how to sanction parties for destruction of evidence, for an abuse of discretion. *Med. Lab. Mgmt. Consultants v. Am. Broad. Co.*, 306 F.3d 806, 824 (9th Cir. 2002). In addition to showing the district court abused its discretion, "the appellant is . . . required to establish that the error was prejudicial." *Tritchler v. County of Lake*, 358 F.3d 1150, 1155 (9th Cir. 2004). We will reverse the district court only if an erroneous ruling "more likely than not affected the verdict." *United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004) (internal quotation marks omitted). Byrd

challenges the district court's decision to admit the Video Yearbook into evidence, as well as its refusal to give his proposed adverse inference jury instruction regarding the County's alleged destruction of the unedited footage. We consider these issues in turn.

A

First, Byrd argues the district court erred by permitting the County to introduce the Video Yearbook. According to Byrd, the video was irrelevant because it does not include footage of O'Connell searching Byrd, or indeed, of O'Connell conducting any of the searches she performed that day. Moreover, Byrd argues that the video was prejudicial because it presented the cadets in a highly flattering light. Finally, Byrd asserts that the Video Yearbook was misleading because searches depicted in the video showed cadets performing fully clothed searches on their supervisors, rather than the search of Byrd in his underwear. Byrd contends that the prejudicial and misleading effect of the video outweighs its limited or nonexistent probative value, and therefore, the district court abused its discretion by allowing it to be shown to the jury.

We disagree. Evidence that is otherwise admissible may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. However, evidence that may have been otherwise excluded under Rule 403 may become admissible based on events at trial. "Under the rule of curative admissibility, or the 'opening the door' doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discre-

tion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission." *United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988); *accord Jerden v. Amstutz*, 430 F.3d 1231, 1239 n.9 (9th Cir. 2005).

At the pretrial hearing, after Byrd's counsel objected to the possible introduction of the Video Yearbook, the County indicated that it did not intend to offer the video as an exhibit unless Byrd's counsel opened the door by insinuating that the County videotaped the particular search of Byrd and then erased it. In his opening statement, Byrd's counsel indicated that the County's alleged destruction of the tape would be an issue at trial, stating, "You will learn that this training demonstration on Mr. Byrd was videotaped but that the portion of the tape has now been erased." During direct examination, the following exchange occurred between Arpaio and Byrd's counsel:

> Q: [B]eing in law enforcement, you would agree that officers must preserve all evidence which is critical to inmate's complaints.
>
> A: Yes.
>
> Q: And you would agree that it would be improper, actually illegal, to lose evidence to cover up wrongdoing; correct, sir?
>
> A: To cover up wrongdoing?
>
> Q: Yes.
>
> A: Yes.

Based on this line of questioning, the district court found that Byrd's counsel was laying the foundation for an instruction permitting the jury to infer that any missing evidence, namely, the complete video

footage recorded that day, was damaging to the County. Therefore, the district court held that Byrd's counsel had opened the door for the County to show the Video Yearbook so the jury could determine whether the original video tape was likely or unlikely to contain what Byrd alleged. Byrd's counsel subsequently played the video during closing argument in an effort to prove the searches conducted on the day in question were for training purposes rather than security purposes.

Because Byrd opened the door to the introduction of this evidence, the district court did not abuse its broad discretion in admitting the Video Yearbook as an exhibit. *See United States v. Segall*, 833 F.2d 144, 148 (9th Cir. 1987). The Video Yearbook was relevant to rebut Byrd's assertion in opening argument, and suggestion during Arpaio's direct examination, that the original tape depicted an abusive search and had been improperly edited or destroyed. Moreover, Byrd has not demonstrated that any unfair prejudice substantially outweighed the video's value, or that the verdict would have been any different absent the video.

B

Byrd next argues the district court erred in its formulation of an adverse inference instruction. Byrd requested that the district court provide the following instruction:

> The Maricopa County Sheriff's Office video recorded academy class 813's search of the Durango Jail, Housing Unit 4, on October 28, 2004. On that same day, Mr. Byrd filed a complaint with the Maricopa County Sheriff's Office alleging that a female cadet had sexually assaulted him. The Maricopa County Sheriff's

> Office erased the video footage of academy class 813's search of the Durango Jail, Housing Unit 4, despite actual notice of Mr. Byrd's claims and allegations. The Maricopa County Sheriff's Office's destruction of the footage demonstrates that the academy class's search was done solely for training purposes and that Ms. O'Connell grabbed Mr. Byrd's penis, scrotum and testicles, and inserted her finger into Mr. Byrd's anus. [altered to correct the spelling of "Sheriff"].

The district court agreed to give an adverse inference instruction, but provided the following to the jury:

> A party who has timely notice of the assertion of a claim has a duty to take reasonable efforts to preserve evidence. If a party with such notice fails to preserve evidence through some fault of its own, you may draw an inference that the evidence not preserved would have been favorable to the opposing party.

Byrd argues that this instruction is inadequate because it did not direct the jury to make an adverse inference against the County. We disagree. The district court's instruction accurately stated the law and was adequate to allow the jury to determine whether an adverse inference against the County was warranted. "A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1398 (9th Cir. 1984). Moreover, Byrd was not entitled to an instruction that directed the jury to reach a conclusion about matters

of disputed fact. *Roberts v. Spalding*, 783 F.2d 867, 873 (9th Cir. 1986). Because the district court found that the applicability of the adverse inference instruction turned on disputed facts, the court's decision to give the instruction in the abstract and allow the parties to argue to the jury whether the facts supported its application was not an abuse of the district court's broad discretion.

IV

We next turn to Byrd's argument that the district court erred in granting judgment as a matter of law in favor of Arpaio and O'Connell. Byrd contends that, notwithstanding the jury's findings, the search, and in particular the cross-gender aspect of it, violated both his substantive due process right to be free from punishment and his *Fourth Amendment* right to be free from unreasonable searches.[8] "We review de novo an order granting or denying judgment as a matter of law." *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 755 (9th Cir. 2006) (internal quotation marks omitted). "In considering a motion under Rule 50 of the Federal Rules of Civil Procedure, we view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in

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[8] The County contends that Byrd has waived any challenge to the specific search at issue here and is challenging only the County's general policy allowing cross-gender searches. We reject this argument. Byrd argued both before the district court and on appeal that the search conducted by O'Connell violated his constitutional rights, and he pursued a claim against Arpaio in both his individual and official capacities. We read Byrd's appeal as challenging both the search to which he was subjected and the alleged County policy which putatively caused it to occur. *See, e.g., Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991).

favor of that party." *E.E.O.C. v. Pacific Maritime Ass'n*, 351 F.3d 1270, 1272 (9th Cir. 2003). Judgment as a matter of law "should be granted when the evidence permits only one reasonable conclusion as to the verdict. If conflicting inferences may be drawn from the facts, the case must go to the jury." *Redman v. County of San Diego*, 942 F.2d 1435, 1439 (9th Cir. 1991) (en banc) (internal quotation marks and citation omitted).

Our review is sharply circumscribed by *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), in which the Supreme Court upheld visual body cavity searches of pretrial detainees against their *Fourth* and *Fourteenth Amendment* challenges. Under *Bell*, when reviewing conditions and restrictions placed on prisoners and pretrial detainees, we must bear in mind the inherent difficulties in managing a detention facility, and that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Id.* at 547. Judicial deference to prison officials is appropriate on the grounds that "the realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch." *Id.* at 548 n.29. Therefore, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Id.* at 540 n.23 (internal quotation marks omitted).

In light of these principles, our task is to determine whether the district court erred in holding that, as a

matter of law, neither Maricopa County nor the individual defendants (O'Connell and Arpaio in his individual capacity) violated Byrd's constitutional rights.[9] We must also undertake our review in light of the jury's factual determinations that the search was performed for an "identified security need," and that O'Connell did not search Byrd in an inappropriate manner. Byrd does not challenge these findings on appeal, and therefore we are bound by them.

A

We first consider Byrd's argument that the search violated his substantive due process right to be free from punishment. Byrd contends the search at issue amounted to punishment because it was conducted by a woman despite the availability of men; he was not told that O'Connell was associated with the jail system; jail officials carried taser and pepper guns, cursed at him, and ordered him to remain silent; and a person with a hand-held camera was present. Moreover, Byrd states that he suffers from a history of sexual abuse, and therefore the cross-gender aspect of the search was particularly traumatic. Byrd asserts that the prison officials displayed deliberate indifference to the harm the search would cause him, both because any person would know that the circumstances of this search would cause shock, degradation, and pain, and because these consequences were easily preventable by having male officials who were standing nearby conduct the search.

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[9] The defendants sued in their individual capacities did not assert qualified immunity in district court, and accordingly we do not consider the issue on appeal.

When the government holds a person in confinement as a pretrial detainee, it "may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment or otherwise violate the Constitution," *Bell*, 441 U.S. at 536-37, because "under the *Due Process Clause*, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law," *id.* at 535; *accord Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004). This standard is different from that applied to prisoners, "who may be subject to punishment so long as it does not violate the *Eighth Amendment's* bar against cruel and unusual punishment." *Pierce v. County of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008) (citing *Bell*, 441 U.S. at 535 n.16). "Because pretrial detainees' rights under the *Fourteenth Amendment* are comparable to prisoners' rights under the *Eighth Amendment*, however, we apply the same standards." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

When prisoners challenge conditions or deprivations associated with their confinement, a court must consider the two components of an *Eighth Amendment* claim: (1) the objective component, which addresses whether the deprivation was sufficiently serious to constitute "cruel and unusual" punishment; and (2) the subjective component, which addresses whether the prison officials acted with "a sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). The Supreme Court explained that the latter intent requirement did not emanate from "the predilections of this Court, but the *Eighth Amendment* itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally

meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify" as punitive. *Id.* at 300 (emphases in original).

The same intent requirement is applicable in the pretrial detainee context: the Supreme Court has explained that whether a particular action or condition of confinement amounts to punishment turns on whether the action taken, or condition imposed, was accompanied by punitive intent. *See Bell*, 441 U.S. at 538-39.

Punitive intent may be proven in various ways. It is most obvious when an official expresses an intent to punish a detainee. *See id.* at 538. When there is no evidence "of an expressed intent to punish on the part of detention facility officials," punitive intent can be inferred. *Id.* If "a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Id.* at 539; *see also Block v. Rutherford*, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984). When detention facility officials are personally accused of depriving incarcerated persons of "the minimal civilized measure of life's necessities," *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981), or exposing them to "conditions posing a substantial risk of serious harm," *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), punitive intent can be inferred from an officer's "deliberate indifference" to the harm caused. *See Seiter*, 501 U.S. at 302-03 (explaining the applicability of the deliberate indifference standard to prisoner

cases); *Frost*, 152 F.3d at 1128 (explaining the applicability of the deliberate indifference standard to cases involving pretrial detainees). A detention facility official acts with "deliberate indifference" if "he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847; *accord Frost*, 152 F.3d at 1128. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

Byrd has not alleged or adduced any evidence indicating that O'Connell or Arpaio expressed an intent to punish him. *See Bell*, 441 U.S. at 538. Therefore, in order to prevail on his substantive due process claim, Byrd must present evidence from which an inference of punitive intent may be drawn. *See id.* at 538-39; *Farmer*, 511 U.S. at 847. Byrd contends that we should draw such an inference in this case because the search in question is analogous to those we struck down in *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993) (en banc).

In *Jordan*, a prison had instituted a policy requiring "male guards to conduct random, non-emergency, suspicionless clothed body searches on female prisoners." 986 F.2d at 1522 (footnote omitted). The searches were aggressive and intrusive:

> According to the prison training material, "a guard [was] to use a flat hand and pushing motion across the inmate's crotch area." The guard [was to] "push inward and upward when searching the crotch and upper thighs of the inmate." All seams in the leg and the crotch area [were] to be "squeezed and kneaded." Using the

> back of the hand, the guard also [was] to search the breast area in a sweeping motion, so that the breasts [would] be "flattened."

Id. at 1523 (alterations and internal citations omitted).

In evaluating whether the policy in Jordan violated the *Eighth Amendment*'s ban on "unnecessary and wanton infliction of pain," we first considered the objective component of an *Eighth Amendment* claim by addressing whether the deprivation was sufficiently serious. We concluded that the district court's finding that the searches constituted the "infliction of pain" on the female inmates was not clearly erroneous, in light of substantial evidence that many of the female inmates had been violently sexually abused prior to their incarceration and were psychologically fragile, and that the cross-gender searches would cause some inmates substantial suffering. *Id.* at 1525-26. The evidence included extensive expert testimony from "staff members, social workers, psychologists, an anthropologist, and the former Director of Corrections for four different states at various times." *Id.* at 1526. One expert testified that "the unwilling submission to bodily contact with the breasts and genitals by men would likely leave the inmate 'revictimized,' resulting in a number of symptoms of posttraumatic stress disorder." *Id.* (alteration omitted). This evidence was corroborated by inmates' testimony, as well as evidence that one inmate who was searched "had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cell block." *Id.* at 1523.

We then considered the subjective component of an Eighth Amendment claim by addressing whether the

prison officials had acted with "deliberate indifference." *Id.* at 1527. We concluded that they had, *id.* at 1530, basing this conclusion on evidence that the policymaker at the prison was aware of the risk of psychological trauma to the female inmates, but nevertheless proceeded with the implementation of the search policy, *id.* at 1528-29. Specifically, the prison policymaker "was urged by members of his own staff not to institute cross-gender clothed body searches due to the psychological trauma which many inmates likely would suffer." *Id.* at 1528. In addition, a court order was required to stop the practice "although one of the first inmates to be searched suffered a severe reaction." *Id.* at 1528-29. We also held that the search policy was "unnecessary" because the facility's "security [was] not dependent upon" cross-gender searches; nor did the searches "ensure equal employment opportunities for male guards." *Id.* at 1526-27.

Applying the *Jordan* framework here, the prison officials did not have the mental state necessary for their actions to constitute punishment. Taking the evidence and all inferences in the light most favorable to Byrd, *see Redman*, 942 F.2d at 1439, there is no evidence in the record that would allow a rational jury to conclude that either O'Connell or Arpaio knew the cross-gender aspect of the search would cause Byrd harm, or that either of them "disregard[ed] that risk by failing to take reasonable measures to abate it," *Farmer*, 511 U.S. at 847. Arpaio testified that in over 15 years, there had never been a problem with a male being searched by a female, and the record does not show otherwise. Byrd did not indicate to anyone at the jail before or during the search that he had a history of sexual abuse, and there is no evidence that anyone at the

jail was aware of this history. Moreover, O'Connell testified that she had searched a "couple hundred" men in the same manner, and no man had ever adversely reacted to a search. Therefore, Byrd has not shown that either O'Connell or Arpaio acted with deliberate indifference in conducting the search.

Finally (and as discussed in more detail *infra* pp. 5934-37), because the search was reasonably related to the County's legitimate security needs, as found by the jury, and because the County had a legitimate operational basis for permitting cross-gender searches, we cannot infer that the purpose of the search was punitive. *Bell*, 441 U.S. at 561.

Because the search was reasonably related to legitimate governmental needs, and because Byrd has pointed to no evidence from which a rational jury could conclude that it was conducted with "deliberate indifference" to pain the cross-gender aspect of the search might cause, it did not constitute punishment. Therefore we must conclude that neither Arpaio nor O'Connell violated Byrd's substantive due process rights. *Cf. Jordan*, 986 F.2d at 1527-30. Accordingly, we need not consider the objective component of Byrd's claim (the degree of deprivation or harm), or whether a pretrial detainee may be able to bring a *Fourteenth Amendment* substantive due process claim based on evidence of a less severe deprivation or harm than would be necessary to establish an *Eighth Amendment* "cruel and unusual" punishment claim. *See id.* at 1525-26.

Because Byrd has suffered no substantive due process deprivation, his claim against Maricopa County necessarily fails. Byrd has not alleged that any action apart from the cross-gender search performed by O'Connell violated his substantive due

process rights, and "[n]either a municipality nor a supervisor . . . can be held liable under § 1983 where no injury or constitutional violation has occurred." *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir. 2001); *see also City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986); *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th Cir. 1996); *cf. Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) (per curiam) (holding that a city may be liable under § 1983 even when individual officials are exonerated, if a constitutional deprivation was attributable to city action or inaction). We therefore affirm the district court's grant of judgment as a matter of law to Arpaio and O'Connell on Byrd's substantive due process claim.

B

We next turn to the question whether the district court erred in holding that the search was reasonable under the Fourth Amendment as a matter of law, notwithstanding its cross-gender aspect. Again, we are bound by the jury's unchallenged findings that the search in question was for security purposes and that O'Connell did not conduct it inappropriately.[10] We take all other evidence and the inferences therefrom in the light most favorable to Byrd. *See Redman*, 942 F.2d at 1439. However, "we must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, our inferences must accord deference to the views of prison authorities." *Beard v. Banks*, 548

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[10] To avoid confusion, we reiterate that the district court's Rule 50 holding was contingent upon the jury finding that O'Connell did not perform the search inappropriately and that it was performed for a security reason.

U.S. 521, 530, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006) (plurality op.); *see also Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). As noted above, this is due in part to the "difficulty of operating a detention facility safely, [and] the seriousness of the risk of smuggled weapons and contraband." *Way v. County of Ventura*, 445 F.3d 1157, 1161 (9th Cir. 2006); *see also Bell*, 441 U.S. at 548 n.29.

We agree with Byrd's contention that we must analyze his claim in light of both *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) and *Bell*. The Supreme Court in *Bell* assumed, without deciding, that pretrial detainees retain *Fourth Amendment* rights, 441 U.S. at 558, but subsequently held in *Hudson v. Palmer* that "the *Fourth Amendment* proscription against unreasonable searches does not apply within the confines of the prison cell." 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). We have held that the Fourth Amendment does apply to the invasion of bodily privacy in prisons, but the "reasonableness of a particular search is determined by reference to the prison context." *Michenfelder v. Sumner*, 860 F.2d 328, 332 (9th Cir. 1988). The government "may restrict or withdraw rights to the extent necessary to further the correctional system's legitimate goals and policies." *Grummett v. Rushen*, 779 F.2d 491, 493 (9th Cir. 1985).

In considering *Fourth Amendment* claims, *Bell* mandates a "test of reasonableness," which "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." 441 U.S. at 559. In evaluating *Fourth Amendment* claims brought by incarcerated

persons, *Bell* directs us to consider: (1) "the scope of the particular intrusion"; (2) "the manner in which it is conducted"; (3) "the justification for initiating it"; and (4) "the place in which it is conducted." *Id.* In *Turner*, the Court provided more guidance regarding *Bell's* reasonableness standard, holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. The Court set forth several factors as being "relevant in determining the reasonableness" of a prison regulation or practice: (1) "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," which, if the impact is substantial, requires particular deference to corrections officials; and (4) "the absence of ready alternatives" as evidence of the reasonableness of a prison regulation, or "the existence of obvious, easy alternatives" as evidence that the regulation "is an 'exaggerated response' to prison concerns." *Id.* at 89-91 (internal citations and quotation marks omitted).

There are limits to the applicability of the reasonableness factors outlined in *Turner*. We have not applied *Turner* to a pretrial detainee's *Fourteenth Amendment* claim of punishment, *see Demery*, 378 F.3d at 1028, and *Turner* is not applicable to all prisoner challenges based on a deprivation of constitutional rights, *see Johnson v. California*, 543 U.S. 499, 510-11, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (declining to apply *Turner* to the right not to

be discriminated against on the basis of race and indicating it may not be applicable to *Eighth Amendment* claims of cruel and unusual punishment). However, *Turner* is applicable to "rights that are inconsistent with proper incarceration," *Johnson*, 543 U.S. at 510 (internal quotation marks omitted), and "courts have applied the *Turner* test to prisoners' *Fourth Amendment* claims," *Thompson v. Souza*, 111 F.3d 694, 699 (9th Cir. 1997); *see also Michenfelder*, 860 F.2d at 332-33. Additionally, we have applied *Turner* to prisoners' challenges arguing that cross-gender strip searches violated their right to privacy. *Michenfelder*, 860 F.2d at 333-34.

Logically, a pretrial detainee is entitled, at a minimum, to the same protection of constitutional rights as would be available to a convicted inmate under the *Turner* framework. *Bell*, 441 U.S. at 545 ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."); see also *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). Therefore, although *Turner* considered only the rights of convicted prisoners, its framework is relevant to analyzing the constitutional rights of pretrial detainees, and we have looked to it in the past. *See Pierce*, 526 F.3d at 1209 (analyzing religious freedom rights of pretrial detainees under *Turner*); *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc) (analyzing *First Amendment* rights of pretrial detainees under *Turner*).

For these reasons, in reviewing the reasonableness of a search, we are guided by *Turner's* direction to consider whether the challenged conduct was "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; *see also Thompson*, 111 F.3d

at 699-700 (applying *Turner* and *Bell* to *Fourth Amendment* claim). In evaluating whether the search meets this test, we are mindful of the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559.

Beginning with the first factor of *Turner's* reasonable-relation test, the jury found that the search was done for an identified security need. There is no dispute that the County's security-related need to respond to reports of contraband and fighting in Byrd's housing unit is a "legitimate governmental interest," or that the reports of contraband and fighting are rationally connected to, and a valid justification for, conducting the pat down and partial strip searches. 482 U.S. at 89; *see also Bell*, 441 U.S. at 546-47 ("Central to all other correction goals is the institutional consideration of internal security within the corrections facilities themselves." (*quoting Pell v. Procunier*, 417 U.S. 817, 823, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974) (alteration omitted))).[11]

Moving to the *Bell* factors, the scope of the search was reasonable given the County's suspicion of contraband circulating in the jail, and inmates' ability to conceal contraband in private areas. In *Bell*, the Court held that visual body cavity searches were justified by the detention facility officials' need to detect contraband and maintain security, even

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[11] The second *Turner* factor, "whether there are alternative means of exercising the right that remain open to prison inmates," 482 U.S. at 90, is not applicable in the *Fourth Amendment* context, because the right to be free from unreasonable searches is not a right susceptible to exercise by alternative means, *see Thompson*, 111 F.3d at 699; *Michenfelder*, 860 F.2d at 331 n.1.

though there had been only one incident of attempted contraband smuggling. 441 U.S. at 559. We have upheld similar searches of incarcerated persons against constitutional challenges. *See Rickman v. Avaniti*, 854 F.2d 327, 328 (9th Cir. 1988) (approving same-gender strip searches conducted in cells of prisoners housed in administrative segregation prior to leaving cell); *see also Thompson*, 111 F.3d at 701 (holding same-gender body-cavity search did not violate clearly established rights). Nor did the place of the search make it unreasonable. We have upheld strip searches even when they took place in view of others, in light of institutional needs and realities. *See Thompson*, 111 F.3d at 701 (rejecting argument that same gender strip search and visual body cavity search should have been conducted out of view of other prisoners who were laughing or whistling); *Michenfelder*, 860 F.2d 328 (upholding prison's same-gender visual body cavity searches whenever an inmate left or returned to the maximum security unit, notwithstanding fact that strip searches were conducted at the end of a hallway).

The manner of this search requires closer scrutiny, however, because Byrd alleges the cross-gender aspect of the search makes it unreasonable. We have recognized that the "desire to shield one's unclothed figure[] from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also Michenfelder*, 860 F.2d at 334 (stating that this court recognizes "that incarcerated prisoners retain a limited right to bodily privacy" in the context of being viewed by members of the opposite sex); *Grummett*, 779 F.2d at 494 (same). Yet, while we have not foreclosed the possibility that a cross-gender search

could violate an incarcerated person's constitutional rights, we have noted that "our prior case law suggests that prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely limited." *Jordan*, 986 F.2d at 1524. We have never held that a cross-gender search in a prison setting violated an inmate's *Fourth Amendment* rights. *See Grummett*, 779 F.2d at 496; *Jordan*, 986 F.2d at 1524; *cf. Somers v. Thurman*, 109 F.3d 614, 620 (9th Cir. 1997) (in context of qualified immunity, holding right to be free of cross-gender searches not clearly established). Rather, we have upheld cross-gender visual observations and body searches in certain circumstances.

In *Grummet*, we upheld a policy permitting female officers to conduct pat-down searches of male prisoners when the searches were "done briefly"; "in a professional manner and with respect for the inmates"; and performed on inmates who were "fully clothed, and thus [did] not involve intimate contact with the inmates' bodies." 779 F.2d at 496. The prison did not require female officers to "conduct or observe strip or body cavity searches" except in emergencies. *Id.* We additionally upheld a policy when women were assigned to positions requiring "infrequent and casual observation" of unclothed male prisoners in their cells and while showering. *Id.* at 494. We noted that preventing females from working in positions that would require occasional invasions of inmates' privacy "would necessitate a tremendous rearrangement of work schedules, and possibly produce a risk to both internal security needs and equal employment opportunities for the female guards." *Id.* at 496. Under these circumstances, we concluded that "the inmates have not demonstrated that these restricted observations by

members of the opposite sex are so degrading as to require intervention by this court," *id.* at 495, or that the searches were "so offensive as to be unreasonable under the *fourth amendment*," *id.* at 496.

In *Michenfelder*, we rejected a prisoner's argument that a prison invaded his right to privacy due to a policy permitting the presence of female officers during visual body cavity searches in hallways, and permitting females to work in positions that allowed observation of unclothed male inmates. 860 F.2d at 334. In determining whether the policies were reasonably related to legitimate penological interests, we "recognize[d] as legitimate both the interest in providing equal employment opportunities and the security interest in deploying available staff effectively." *Id.* We upheld the stripsearch policy because female officers were not "routinely present for [the] strip searches" and did not "regularly or frequently observe unclothed inmates without a legitimate reason for doing so." *Id.* We also upheld females' placement in positions that included "shower duty," because female officers' presence "did not establish an inappropriate amount of contact with disrobed prisoners." *Id.* We reasoned, in part, that "[p]rohibiting female employees from working" in areas that allowed observation of unclothed inmates, or "requiring [female employees] to be replaced by males for the duration of strip searches, would displace officers throughout the prison." *Id.* (stating that the "third *Turner v. Safley* factor has special relevance here").

Byrd argues the search in question is distinguishable from those we upheld in *Michenfelder* and *Grummet*. He contends the cross-gender aspect of the specific search at issue was not reasonable, but

rather was an "'exaggerated response' to prison concerns," *Turner*, 482 U.S. at 90, because of the invasiveness of the search and the ready availability of male officials to conduct it. Because the male officials were immediately available, he asserts there would have been no impact on the jail's allocation of resources or on its procedure for meeting security needs if a male, rather than a female, had searched him. Byrd further argues that the cross-gender element of the search was not justified by the County's need to provide equal employment opportunities to female prison officials. He cites testimony from County witnesses that they were not aware of any incident in which a female officer's employment opportunities were hampered as a result of accommodations to protect the privacy interests of male detainees.

Even taking all facts and inferences therefrom in Byrd's favor, however, we cannot conclude that the manner of the search was unreasonable, or constituted an "exaggerated or excessive means to enforce security." *Thompson*, 111 F.3d at 700 (internal quotation marks omitted). As noted, the jury found that the search was not done in an inappropriate manner. The record indicates that O'Connell wore gloves at all times, and conducted the search professionally and swiftly, finishing in, at most, 60 seconds. The invasion of Byrd's bodily privacy in this case does not substantially exceed the cross-gender observations and searches we upheld in *Michenfelder* and *Grummet*. Moreover, the County has provided a legitimate justification for the cross-gender aspect of the search: the County adduced undisputed evidence that the cross-gender search was justified by its legitimate security and staffing needs, focusing primarily on the shortage of adequate personnel.

Captain Peterson testified that the County did not have sufficient numbers of male detention officers to conduct searches of male inmates, as required to meet safety and security needs, without the assistance of female officers. Further, Peterson testified that the County was not able to obtain a greater number of male officers for these searches because it had difficulties hiring adequate staff, and because it could not pull male officers from other jail facilities. Cadets, including females, were regularly called to assist in mass searches "because of [the need for] additional manpower, and we have no other place to get it from except" from the Academy. We have held that the County has a legitimate "security interest in deploying available staff effectively." *Michenfelder*, 860 F.2d at 334. Accordingly, we cannot conclude that the cross-gender search lacked a "valid, rational connection" to the County's legitimate justifications. *Turner*, 482 U.S. at 89.

Turning to the impact that accommodation of Byrd's *Fourth Amendment* rights would have "on the allocation of prison resources generally," *id.* at 90, Byrd contends that the search was an "'exaggerated response' to prison concerns" because the presence of male officials at the search provided "an alternative that fully accommodates the prisoner's right at *de minimis* cost to valid penological interests," *id.* at 90-91. This argument goes too far. A detention facility that hires both male and female officers to meet its staffing needs will regularly have male officers, as well as female officers, available at searches. The determination sought by Byrd, that it is per se unreasonable for a female officer to conduct searches of male inmates when male officers are also present, would significantly limit the usefulness of female officers for meeting a detention facility's security

needs. In this case, such a determination would be inconsistent with the County's approach to staffing and deploying its officers, and contrary to the County's uncontradicted testimony that it has inadequate male staff to meet its security needs, and must therefore use both male and female officials to conduct searches on male inmates.

Moreover, the County has already made a determination regarding when it can reasonably accommodate cross-gender concerns: its policies prohibit cross-gender observation and administration of unclothed strip and body cavity searches, and its policies prohibit visual inspection of inmates' genitalia during a cross-gender pat down and partial strip search. In light of the jury's findings, and the "wideranging deference" we owe to the County's professional judgment on these operational issues, *Bell*, 441 U.S. at 547, we conclude that the cross-gender search in question was not an exaggerated response to prison concerns.

We emphasize that the question whether the district court erred in granting the County's motion for judgment as a matter of law is close. We are troubled by the overall circumstances of the search in question. The scope of the search was invasive in that it involved contact with Byrd's genital region, albeit through his boxer shorts. The embarrassment inherent in such a pat down and partial strip search was amplified by several factors: the cross-gender aspect; the fact that it took place in the presence of many officers and cadets, one third of whom were female; and that it took place in the presence of a person with a hand-held camera, notwithstanding the fact that the record does not give rise to the inference that Byrd's search was recorded.

Yet, while prisoners and detainees retain "legitimate expectations of bodily privacy from persons of the opposite sex," we are obligated to acknowledge that such rights are "extremely limited." *Jordan*, 986 F.2d at 1524. The hallmark of the *Fourth Amendment* is reasonableness, *see, e.g.*, *Bell*, 441 U.S. at 558, and we must assess reasonableness in the context of detention settings and the intractable problems facing prison administrators, *see, e.g.*, *Turner*, 482 U.S. at 84-89. We review this case in the additional light of the jury's findings that the search was not conducted in an inappropriate manner and that it was conducted for an identified security need; the undisputed evidence of the County's staffing issues; and the County's existing restrictions on cross-gender contact between detention officers and inmates. We also take seriously the Supreme Court's direction that, in reviewing security- and operations-related restrictions or conditions imposed by prisons, "courts must heed our warning that 'such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Bell*, 441 U.S. at 540 n.23 (quoting *Pell*, 417 U.S. at 827 (alteration omitted)). Given these factors, even viewing the facts (other than those found by the jury) in the light most favorable to Byrd, we cannot conclude that the district court erred in determining that the search did not violate Byrd's *Fourth Amendment* rights.

The judgment of the district court is AFFIRMED.

CONCUR BY: Ferdinand F. Fernandez (In Part)

DISSENT BY: Ferdinand F. Fernandez (In Part)

DISSENT

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in part and dissent in part. In particular, I concur in most of the well reasoned majority opinion, but dissent from the determination in part IVB that the cross-gender search was reasonable under the circumstances and was not a violation of the *Fourth Amendment.*

In my view, cross-gender strip searches are generally uncalled for and unreasonable. We have never held that any cross-gender strip search is proper, although we have allowed for situations where female guards can observe unclothed male prisoners,[1] and have even approved of the pat down of fully clothed male prisoners by female guards.[2] Moreover, in one case we determined that a cross-gender search of clothed female prisoners by male guards was unconstitutional under the circumstances presented in that case, but the basis of our decision was not the *Fourth Amendment*. *See Jordan v. Gardner*, 986 F.2d 1521, 1523-26 (9th Cir. 1993) (en banc).

I do not suggest that a cross-gender strip search can never be appropriate. There may be emergency or other situations where a cross-gender strip search is proper, but this case presents no facts to suggest that

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[1] *See Michenfelder v. Sumner*, 860 F.2d 328, 333-34 (9th Cir. 1988); *Grummett v. Rushen*, 779 F.2d 491, 495-96 (9th Cir. 1985).

[2] *See Grummett*, 779 F.2d at 496.

there was an emergency or some other unique reason for authorizing the search. In fact, the record shows that this sort of search is a regular part of the jail's routine,[3] and that there were plenty of men available, who could have conducted the search.[4]

When all is said and done, I would not think it was reasonable for males to strip search females in this kind of situation, and I do not think it was reasonable to have females strip search males. If our law does approve of it, and the majority opinion cogently reasons that it does, I reluct; the law should change.

Thus, I respectfully dissent in that respect and otherwise concur in the majority opinion.

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[3] The County has indicated that "[i]t is our custom and practice to perform regular mass pat searches and cell searches in Durango Jail for security purposes. . . . Pat searches and cell searches are always together and routinely performed for security purposes about four times a month." It is interesting to note that the County, throughout, insists that this strip search was merely a pat search. It shrinks from suggesting that cross-gender strip searches would be appropriate under these circumstances.

[4] For example, O'Connell testified that of some thirty-two to forty-five cadets on hand only a couple were females.

APPENDIX C

UNITED STATES DISTRICT COURT

August 15, 2007
Jury Trial, Day 2

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[464]

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THE COURT: I looked at the *Fuller* case, and that had to do with a pretrial—an arrestee who is still not even sent to general population. It had to do with needs for specific reasonable suspicion to do a strip search and I think that's entirely distinguishable from a detainee who was in general population.

So I don't think that case carries the day. It brings me back to—well, first of all, first of all, the Motion For Judgment as a matter of law in favor of Captain Peterson is granted.

The critical issue of—and as I have already indicated, I find they are triable issues of fact as to the, quote, "groping allegation," close quote, and as to whether this search was merely a training exercise without specific justification for security or safety reasons and therefore those two issues go to the jury.

The—as I indicated before, the broad issue, Mr. Lopez, about cross-gender searches in general I think is controlled by *Grummett* and as reiterated in *Jordan* and that the evidence that we have which is really largely [465] Officer O'Connell's acknowledgment of common sense, that male prisoners, too, can be

psychologically traumatized by cross-gender searches, I don't think carries us up to the level of *Jordan*.

And the reading of *Jordan* and *Grummett* together I think simply foreclose me from doing anything but granting the defendant's Motion For Directed Judgment as a matter of law on the general challenge to the cross-gender search.

As to the more narrow issue that we articulated of the cross-gender search where the male inmates are stripped down to their underwear, that's a closer question. And if I were writing on a clean slate, I might well go with you, Mr. Lopez, but I don't think I'm writing on a clean slate.

And looking at the weight of the Ninth Circuit authority and the facts of the cases, I have to conclude that that, too, falls short of constitutional invalidity. But it's a closer case.

And if you decide you want to take this case further, you will have a better opportunity in the Court of Appeals than you will have in a district court where they don't have the same obligation that I have to my most accurate reading of the weight of authority.

So I'm going to grant the defendant's Motion For Direct—Judgment as a matter of law with respect to that more narrow challenge to the policy of the cross-gender search as [466] well.

The issue of Mr. Byrd's particular circumstances and the evidence, taking all of that as true, I'm not persuaded that that can constitute either a basis for invalidity of the general policy or as a basis for an individualized claim absent some communicated knowledge to the jail authorities.

I'm quick to acknowledge that there is an inherent unfairness in that because you wouldn't have an occasion to volunteer that as you have argued, but I conclude that to hold otherwise is simply a backdoor way of invalidating what is otherwise generally a valid policy under the cases as I read them. So that leaves the only two things for submission to the jury is the ones I have articulated.

* * *

APPENDIX D

Maricopa County Sheriff's Office Policy & Procedure on Contraband Control provides, in pertinent part:

1. DEFINITIONS: For the purpose of this Policy, the following terms shall apply:

* * *

C. Frisk (Body) Search: Carefully examining an inmate by inspecting his clothing, and feeling the contours of his clothed body. The inmate's shoes and socks may be removed during this process. An inmate's ears, nose, hair and throat may be visually checked during this search.

D. Invasive Body Cavity Search: A physical examination of an inmate's body cavities conducted by licensed medical personnel, not associated with contracted health services, to determine whether an inmate is concealing contraband.

E. Strip Search: A visual scan of the inmate's skin after all clothing has been removed. A strip search may include a visual body cavity search. The clothing will also be manually searched at this time.

F. Visual Body Cavity Search: A noninvasive visual observation of body cavities which are normally not exposed, conducted in conjunction with a strip search. A visual body cavity search will only be performed if there is reasonable suspicion that the inmate is concealing contraband.

* * *

5. Detention personnel shall be familiar with the proper methods for conducting frisk and strip searches, as instructed by Training, and the Facility Training Officer. Inmates will be frisk searched dur-

ing the intake procedure, and prior to placement in a holding cell, as specified in Policy DO-1, *Intake Process*.

A. Male inmates may be frisk searched by either male or female officers. Female inmates will only be searched by female officers, absent exigent circumstances.

* * *

6. Strip searches will be conducted by an officer of the same sex as the inmate, in an area designated by the jail commander. This area must provide inmate privacy, yet maintain jail security and allow control of the inmate.

A. Circumstances which require inmate strip searches include, but are not limited to, the following:

1. Assignment to a new jail.
2. Transfer to another housing unit within the jail.
3. Leaving and returning from outside the jail, or a housing unit.
4. Working inmates reporting to, and returning from, their job assignments. Both searches will be conducted by a housing unit officer.
5. The conclusion of a contact visit.
6. Involvement in a crime of violence.
7. Behavior or observations that give an officer articulable suspicion that contraband may be present.

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APPENDIX E

UNITED STATES DISTRICT COURT

August 15, 2007
Jury Trial, Day 2

Testimony of Kathleen O'Connell

* * *

[351] THE COURTROOM DEPUTY: What do you want to do?

MS. BRANDON: I want to bring this up on that.

THE COURT: The projector.

MS. BRANDON: Thank you very much.

MS. BRANDON:

Q. Going back to what has been marked Exhibit 1, the policy, referring to strip searches will be conducted by an officer of the same sex as the inmate. A strip search means what?

A. That the inmate removes all of their clothing. They turn around, you visually inspect the body cavity, the body and the body cavities to make sure there's no contraband hidden, and once the clothes are removed, you as the officer take it and search the clothes to make sure there's nothing inside the clothes.

Q. Strip searches are according to policy only performed on the same sex?

A. Correct. So myself being a female officer only perform strip searches on female inmates.

Q. In a strip search, does anybody ever touch the inmate's skin?

A. As the officer?

Q. Yes.

A. No. The officer never touches the inmate in a strip search.

Q. Visual means they are just looking at the inmate.

[352] A. Correct.

Q. When you say "looking at body cavities," how do you do that exactly?

A. You ask the inmate to turn around, and it's going to sound graphic but you ask them to spread their butt cheeks, squat and cough so if they have anything, if they place anything in it, when you cough it expels anything that's been put inside the body. It's a visual. You are telling them to do it. You are not actually reaching in and touching the inmate. And then for larger breasted women, you have them lift up their own breasts so you can see underneath, but you do not touch the inmate.

MS. BRANDON: I have nothing further, Your Honor.

THE COURT: Before you sit down, I just had a brief question.

Officer O'Connell, do you know how often and in what circumstances inmates are subjected to a frisk search in which they are required to remove all their clothing except their boxer shorts?

THE WITNESS: In this case, or in any other case, if there is known information to have contraband such as drugs or tobacco or increased fighting in the housing unit, then all of the inmates in that housing unit are subject to the search.

THE COURT: About how often does that happen?

THE WITNESS: A couple times a week. When we get information that there's either drugs or tobacco or stuff, [353] something of that type in the housing units, we don't know which particular inmate has it, therefore every inmate is searched. That's why all of their property is searched as well.

THE COURT: Do you—if you don't know I don't want you to guess, but do you know whether it is regular policy to take the cadet class through a frisk search with the inmates stripped down to their boxer shorts?

THE WITNESS: No.

THE COURT: Is it part of the training?

THE WITNESS: No, sir, I don't know.

THE COURT: It happened for your class, though.

THE WITNESS: Yes, it did.

THE COURT: Let me just think for a minute. All right. That's all I have.

Ms. Brandon, anything further?

MS. BRANDON: No, Your Honor, thank you.

THE COURT: All right.

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August 15, 2007
Jury Trial, Day 2

Testimony of Austin Peterson

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Q. Let's use that situation. Absent an emergency, i.e., a lack of manpower, there is no safety or security need for women to search male inmates; correct?

A. False.

Q. If you have enough male inmates—or excuse me, if you have enough male detention officers that can properly search the jail facility without the assistance of females, there's no need for the females to search the males in those circumstances, is there?

A. We don't have that luxury, sir.

Q. You don't have those luxuries because Sheriff Joe doesn't staff enough male inmates or enough sheriff detention officers in male facilities or because there's not enough female officers hired?

A. We don't have the luxury because we have a hard time hiring people to begin with, as every other law enforcement agency in the State is.

Q. So what you are saying then—well, let's take a step back.

What was the difference in the past in which you just had male detention officers searching male inmates?

A. The population was a lot less and we—our staff was more adequate than it is now based on the percentage of staff to the percentage of inmates.

Q. Can you tell me during your time as a Durango jail commander when you did not have sufficient male detention officers to conduct a proper security and safety search of the male inmates?

A. Everyday.

Q. And if more male officers were transferred into the jail facility to give you that additional manpower, that would be sufficient from your standpoint; yes?

A. That's impossible to do.

Q. That's not my question. I'm asking you if there were more brought to the Durango jail facility to allow you to do that, that would be sufficient; yes?

A. I could only do that if I pulled staff from other facilities. I can't do that.

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[400]

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BY MR. LOPEZ:

Q. Now going back to the DH3 policy, the policy is, strip searches can only be—strip searches of male inmates will only be conducted by an officer of the same sex as the inmate in an area designated by the jail commander; yes? Page 4, paragraph 6.

A. Strip searches. Yes.

Q. Okay. Do you believe an individual that's solely in his boxer shorts and is then searched has been subject to a strip search?

A. No.

Q. And the reason why you believe that is because the individual is wearing boxer shorts; yes?

A. Yes.

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